No. 01-1435-CFX Title: Clackamas Gastroenterology Associates, P.C., Petitioner
v.
Deborah Wells

Docketed:
March 28, 2002 Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Feb 14 2002	Application (01A620) to extend the time to file a petition for a writ of certiorari from February 24, 2002 to March 26, 2002, submitted to Justice O'Connor.
	Feb 15 2002	Application (01A620) granted by Justice O'Connor extending the time to file until March 26, 2002.
	Mar 26 2002	Petition for writ of certiorari filed. (Response due April 27, 2002)
	May 1 2002	Waiver of right of respondent Deborah Wells to respond filed.
	May 14 2002	DISTRIBUTED for Conference of May 30, 2002
	May 20 2002	Response requested.
	Jun 12 2002	Brief of respondent Deborah Wells in opposition filed.
	Jun 24 2002	Reply brief of petitioners Clackamas Gastroenterology Associates, P.C. filed.
	Jun 26 2002	REDISTRIBUTED for Conference of September 30, 2002
	Oct 1 2002	Petition GRANTED. SET FOR ARGUMENT February 25, 2003. **********
	Nov 13 2002	Order extending time to file petitioner's brief on the merits to and including December 2, 2002.
	Dec 2 2002	Brief amici curiae of United States, et al. filed.
	Dec 2 2002	Joint appendix filed.
	Dec 2 2002	Brief of petitioner Clackamas Gastroenterology Associates, P.C. filed.
	Dec 10 2002	Order extending time to file respondent's brief on the merits to and including January 17, 2003.
	Jan 2 2003	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Jan 14 2003	Record filed.
	Jan 17 2003	Brief amici curiae of Lawyers' Committee for Civil Rights Under Law, et al. filed.
	Jan 17 2003	Brief of respondent Deborah Wells filed.
	Jan 17 2003	Brief amicus curiae of American Federation of Labor and Congress of Industrial Org. filed.
	Jan 17 2003	Brief amicus curiae of National Employment Lawyers Association filed.
	Jan 21 2003	Record filed.
	Jan 22 2003	CIRCULATED.
	Jan 27 2003	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Feb 12 2003	LODGING consisting of twenty copies of Articles of Incorporation received from counsel for petitioner and distributed.

No. 01-1435-CFX

Entry	Date	Proceedings and Orders
	Feb 14 2003	Reply brief of petitioner Clackamas Gastroenterology Associates, P.C. filed.
	Feb 25 2003	ARGUED.

Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

CLACKAMAS GASTROENTEROLOGY ASSOCIATES, P.C.,

Petitioner,

v.

DEBORAH ANNE WELLS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Clackamas Gastroenterology Associates, P.C. is a medical clinic formed as a professional corporation but which operates and has legal attributes of a partnership.

The question presented is whether a federal court should apply an economic realities test to determine if the Clinic's physician-shareholders are counted as "employees" for the purpose of determining if the Clinic is a "covered entity" subject to the ADA and other federal anti-discrimination statutes.

In this case, the Ninth Circuit concluded that the physician-shareholders are employees. The court below rejected the holdings of the Seventh, Eighth and Eleventh Circuits which used an economic realities test. Instead, it adopted the reasoning of the Second Circuit which rejected that test.

PARTIES TO THE PROCEEDINGS

Petitioner

Clackamas Gastroenterology Associates, P.C., an Oregon professional corporation. It has no parent corporation; and no publically held company owns ten percent or more of its stock.

Respondent

Deborah Ann Wells.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 271 F. 3d 903 and is reprinted in the appendix hereto at p.1a-10a, *infra*.

The memorandum decision of the United States District Court for the District of Oregon (Panner, D.J.) has not been reported. It is reprinted in the appendix hereto at p.17a-25a, *infra*.

JURISDICTION

The Court of Appeals entered its opinion and order on November 26, 2001. No petition for re-hearing was sought.

On February 15, 2002, Justice O'Connor ordered that the time for filing this petition for writ of certiorari be extended to and including March 26, 2002.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 12101(a)(1), (b)(1) and (2).

(a) ***Findings***
The Congress finds that –

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(b) ***Purpose***
It is the purpose of this chapter –

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

42 U.S.C. § 12111(2), (4), and (5)(A) Definitions under the Americans with Disabilities Act.

(2) Covered entity
The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee.

(4) Employee
The term "employee" means an individual employed by an employer. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(5) Employer

(A) In general
The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this title, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

42 U.S.C. 12112(a) Discrimination under the Americans with Disabilities Act.

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

STATEMENT OF THE CASE

Petitioner is a medical clinic organized as an Oregon professional corporation with four physician-shareholders, who constitute the board of directors. They own the professional corporation and control the management and operation of the medical practice. They each share equally in the profits of the corporation by annual bonuses. Under Oregon law, they remain personally liable for malpractice claims against them, but have limited liability with respect to corporate obligations.

Respondent was, until she voluntarily terminated in May 1997, an employee of the medical clinic. After she terminated, she brought an action against the petitioner under Title I of the ADA, 42 U.S.C. § 12101-12117, and other supplemental state claims.

The clinic moved for summary judgment against Wells' ADA claim on the grounds that it was not an "employer" and, consequently, not a "covered entity" within the meaning of the ADA because it did not have 15 or more employees for the 20 weeks required by the statute. It is undisputed that if the clinic's physician-shareholders are not counted as "employees," then it would have had too few employees to qualify as an "employer." On the other hand, if the physician-shareholders are counted as "employees," then

the number of employees would have exceeded the number required to bring the clinic under the coverage of the ADA.

The District Court applied an economic realities test and found that the four shareholders should be regarded as "partners" and not as "employees" within the meaning of 42 U.S.C. § 12111(4) and (5). The District Court considered conflicting cases from the Second Circuit (*Hyland v. New Haven Radiology Associates, P.C.*, 794 F.2d 793 (2nd Cir. 1986)) which rejected the use of an economic realities test and the Seventh Circuit (*EEOC v. Dowd & Dowd, Ltd.*, 736 F.2d 1177 (7th Cir. 1984)), which used an economic realities test. The District Court found the Seventh Circuit case to be a better-reasoned approach because it exalted substance over form.

The Ninth Circuit reversed in a two-to-one decision with Judge Graber dissenting. The majority found the Second Circuit approach more persuasive, and reversed the judgment of the District Court.

The majority embraced the Second Circuit's reasoning that the use of the corporate form "precludes any examination designed to determine whether the entity is in fact a partnership." *Hyland*, 794 F.2d at 798. The dissent cautioned that the law should be governed by realities, rather than labels. The dissent also observed both that a physicians' professional corporation has many attributes of a partnership as a matter of law, and that the purpose of the 15 employee threshold is to spare very small firms from the potentially crushing expenses of mastering the intricacies of the anti-discrimination statutes. This purpose would be frustrated by the majority's approach, because two clinics, identical in all respects but corporate formality, would be treated differently.

REASONS FOR GRANTING THE WRIT

I. There is a Conflict Among the Circuits Concerning the Use of an Economic Realities Test to Determine Whether a Professional Corporation is a "Covered Entity" for Purposes of the ADA and other Federal Anti-Discrimination Statutes.

The decision of the Ninth Circuit in this case squarely and irreconcilably conflicts with the decisions in the Seventh Circuit, *Dowd & Dowd Ltd.*, (*supra*); the Eight Circuit, *Devine v. Stone, Leyton & Gershman, P.C.*, 100 F.3d 78, 80-81 (8th Cir. 1996);and the Eleventh Circuit, *Fountain v. Metcalf, Zima & Co., P.A.*, 925 F.2d 1398, 1400-01 (11th Cir. 1991).

Under the ADA, it is unlawful for a "covered entity" to discriminate against a qualified individual with a disability on the basis of that disability. 42 U.S.C. § 12112(a). The term "covered entity" includes an "employer." *Id.* §12111(2). An "employer" is defined as "a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year." *Id.* §12111(5)(A). An "employee" is defined as "an individual employed by an employer." *Id.* §12111(4).

Although no circuit has interpreted these specific provisions of the ADA, the court below recognized that there were a number of cases that interpret nearly identical language in other federal employment discrimination statutes, including Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act. It is well recognized that the interpretations found in those cases should apply to all employment discrimination statutes. *See e.g. Serapion v. Martinez*, 119 F.3d. 982, 985 (1st Cir. 1997)("We regard Title VII, ADEA, ERISA, and FLSA as standing in pari passu and endorse the practice of treating

judicial precedents interpreting one statute as instructive in decisions involving another."); *Hyland v. New Haven Radiology Associates, P.C.*, 794 F.2d. 793, 796 (2nd Cir. 1986)(holding that for the FLSA, Title VII, and the ADEA, "Cases construing the definitional provisions of one are persuasive authority when interpreting the others.").

It is generally accepted that those who are properly classified as partners are not "employees" for purposes of the anti-discrimination statutes. *See e.g., Hishon v. King & Spalding*, 467 U.S. 69, 79 (1984). It is also generally accepted that corporate employees are employees under anti-discrimination statutes. *See, e.g., Archer v. Globe Motorists Supply Co., et al.*, 833 F.Supp. 211, 213 (SDNY 1993). However, the status of a shareholder in a professional corporation remains unsettled because its organizational structure is a hybrid of a partnership and a regular corporation.

In *EEOC v. Dowd & Dowd Ltd.*, (*supra*) the Seventh Circuit addressed the specific issue of whether the shareholders of a professional corporation are employees for purposes of the anti-discrimination laws. It applied an economic realities test and concluded that "a shareholder in a professional corporation is far more analogous to a partner in a partnership than it is to the shareholder of a general corporation." *Id.* at *1178*. The court found that the economic reality of a professional corporation is that the management, control and ownership of the professional corporation is much like the management, control and ownership of a partnership. *Id.* The Seventh Circuit's approach was followed by the Eighth Circuit in *Devine*, 100 F.3d at 80-81; and the Eleventh Circuit in *Fountain*, 925 F.2d at 1400-01.

The Ninth Circuit rejected the approach of the Seventh Circuit and refused to apply an economic realities test. Instead, the majority adopted the approach of the Second Circuit in *Hyland v. New Haven Radiology Associates, P.C.* (*supra*). In *Hyland*, the court held that the

use of the corporate form, including professional corporations, "precludes any examination designed to determine whether the entity is in fact a partnership." 794 F.2d at 798. The Second Circuit's position was that once the physicians had chosen a form of business organization, the use of the corporate form precludes any examination designed to determine whether the entity more closely resembles a partnership. *Id.* at *798*.

The approach of the Seventh, Eighth and Eleventh Circuits, which adopts an economic realities test cannot be reconciled with the approach of the Second and Ninth Circuits which rejects an economic realities test on virtually identical facts. There is, therefore, an irreconcilable conflict among the circuits concerning the use of an economic realities test to determine whether a professional corporation is a "covered entity" for purposes of the ADA and other federal anti-discrimination statutes.

This Court should take this case to resolve the conflict among the circuits and to establish a uniform rule. Employers and employees in different parts of the country should not be subject to different standards for determining whether they are subject to the ADA and other anti-discrimination statutes.

II. The Question Presented is Important

The Question Presented has a broad impact on small business throughout this country. Professional corporations with between 15 and 19 or more employees are likely to find themselves caught in the gray zone between small and large employer categories created by the ADA. The impact could go well beyond professional corporations. The same issue can arise with an ordinary corporation. *See e.g., E.E.O.C. v. Pettegrove Truck Service, Inc.*, 716 F.Supp. 1430 (S.D. Fla. 1989) (economic realities test used to determine employee status of a director).

The purpose of the numerical requirement in the ADA is to separate small from large enterprises. Congress decided to "spare very small firms from the potentially crushing expense of mastering the intricacies of the anti-discrimination laws, establishing procedures to assure compliance, and defending against suits when efforts at compliance fail." *Papa v. Katy Industries, Inc.*, 166 F.3d 937, 940 (7th Cir.)(discussing the Congressional purpose "of exempting tiny employers from the anti-discrimination laws," including the ADA), *cert. denied*, 528 U.S. 1019 (1999).

The U.S. Small Business Administration estimates that in 1999 some 429,718 employers had between 15 and 19 employees. These businesses employed a reported 3,451,611 workers, with an annual payroll of $93,753,309,000 [www.sba.gov/advo/stats/#Firm]. Many, if not most, of these gray-zone employers have owners active in management who share risks and profits, and treat each other as partners in a partnership, just like the petitioners. Many are organized as professional corporations, professional associations, limited liability partnerships, and limited liability companies, all of which may be far more analogous to a partnership than a corporation. In today's business climate, many of these enterprises have multi-state (and, consequently, multi-circuit) economic operations. Therefore, there are a significant number of enterprises affected by the Question Presented.

When Congress passed the ADA in 1990, it found that some 43,000,000 Americans had one or more physical or mental disabilities, and this number was increasing as the population as a whole grows older. 42 U.S.C. § 12101(a)(1). The number of those individuals with disabilities who find themselves applying for work with, or are employed by, a small business, including professional corporations in the gray-zone of 15 to 19 employees, is not insignificant. Because of the split in the circuits, ADA protection varies for those disabled Americans who work for identical firms and clinics across the country. Since the numerical requirement for determining ADA coverage varies among the federal circuits, many disabled Americans enjoy ADA protection based solely

upon their employer's geographic location in one circuit or another.

This inconsistency has a nationwide impact on both employers and disabled Americans. It is unlikely that Congress expected people in one circuit to enjoy a different level of protection than people in another circuit. It is also doubtful that Congress intended ADA coverage of identical small businesses to vary from circuit to circuit. The purpose of the ADA is, in part, to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; and, to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities. 42 U.S.C. § 12101(b)(1) and (2).

Because of the split in the circuits, a small medical clinic in Oregon, like the petitioner, is treated differently under the ADA than an identical medical clinic in the Seventh Circuit, only because of its location. This disparate treatment is unfair and incompatible with the purpose of the ADA.

It is important that the courts provide clear, strong, and consistent enforcement standards so that small businesses, and their employees, are treated equally and fairly in all parts of the country.

III. The Decision of the Court of Appeals is Erroneous

A professional corporation has some attributes of an ordinary incorporated business, but it is not identical and retains attributes of a professional partnership. The use of the word "corporation" in both contexts should not limit a court's analysis.

The Ninth Circuit's approach exalts form over substance. Its analysis stops at the label of "corporation." The majority approach of the Seventh, Eighth, and Eleventh Circuits looks at the true relationships among the individual shareholders, including their method of compensation, their responsibility for the entity's liabilities, and the management structure of the entity to determine if the entity should be treated as a partnership or a corporation. This is, in effect, an economic realities test that eschews labels and instead investigates economic reality. This court adopted such an economic reality test in *Goldberg v. Whitaker House Cooperative, Inc., et al.*, 366 U.S. 28, 33 (1961)(an economic reality test was applied to determine whether home workers were employees).

The reason that Congress limited the ADA's coverage to entities with 15 or more employees is economic. Congress decided that smaller employers should not be required to devote the burdensome time and expense to insure compliance with the ADA and other anti-discrimination statutes. The result of the Ninth Circuit opinion is demonstrated by comparing two clinics. Clinic "A, P.C." (the petitioner) is a "covered entity" for ADA purposes. Next door, clinic "B", which is identical in all respects is not a "covered entity" because its four physicians decided not to adopt the P.C. format. Since the purpose of the 15 employee threshold is economic, it makes no sense to treat clinics A and B differently.

The economic reality of the petitioner is that the shareholders are more analogous to partners in a partnership than to shareholders in a corporation. If an economic reality test were applied, the judgment of the District Court should be affirmed.

Certiorari jurisdiction is warranted to correct this error and clarify the law.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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(Any footnotes trail end of each document)

No. 00-35545

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEBORAH ANNE WELLS,
Plaintiff-Appellant,

v.

CLACKAMAS GASTROENTEROLOGY ASSOCIATES, P.C.,
an Oregon Corporation,
Defendant-Appellee.

September 13, 2001, Argued and Submitted, Portland, Oregon

November 26, 2001, Filed

COUNSEL:
Craig A. Crispin, Portland, Oregon, for the plaintiff-appellant.

Steven W. Seymour, Portland, Oregon, for the defendant-appellee.

JUDGES:
Before: David R. Thompson, A. Wallace Tashima, and Susan P. Graber, Circuit Judges. Opinion by Judge Tashima; Dissent by Judge Graber.

OPINION BY:
A. Wallace Tashima

OPINION:

TASHIMA, Circuit Judge:

Plaintiff-Appellant Deborah Anne Wells appeals from the order of the district court granting summary judgment in

favor of Defendant-Appellee Clackamas Gastroenterology Associates, P.C. (Clackamas) on her claim under the Americans With Disabilities Act of 1990 (ADA). The district court held that Clackamas was not an "employer," and therefore not a "covered entity," within the meaning of the ADA because it did not have 15 or more employees during the relevant time periods. We must decide whether Clackamas' physician-shareholders were "employees" within the meaning of the ADA. We have jurisdiction pursuant to *28 U.S.C. § 1291*, and we reverse.

I. BACKGROUND

Wells was an employee of Clackamas, an Oregon professional corporation, from 1986 until her termination in May 1997. During the relevant time period, four physician-shareholders, all of whom participated in the management and operations of the medical practice, were the shareholders and directors of Clackamas. In addition to the physician-shareholders, 12-15 other persons were employed by Clackamas during this time period.

When Clackamas terminated Wells' employment, she brought an action against Clackmas alleging unlawful discrimination on the basis of disability under Title I of the ADA, *42 U.S.C. § § 12101*-12117, and Or. Rev. Stat. § § 659.436-659.449. She also brought a claim for common law wrongful discharge.

Clackamas moved for summary judgment against Wells' ADA claim, arguing that it was not an "employer "and, consequently, not a "covered entity," within the meaning of the ADA because it did not have 15 or more employees for the 20 weeks required by the statute. It is undisputed that if Clackamas' physician-shareholders are not counted as" employees," then it would have had too few employees to qualify as an "employer." On the other hand, if the physician-shareholders are counted as "employees," then the number of employees would have exceeded the number required to bring Clackamas under the coverage of the ADA. Relying on the "economic realities" test, Clackamas argued that its four physician-shareholders should be regarded as "partners" and

not as "employees" within the meaning of *42 U.S.C. § 12111*(4) & (5).

The magistrate judge accepted Clackamas' argument and recommended that the court grant the motion for summary judgment on the ADA claim and decline to exercise supplemental jurisdiction over the remaining claims. The district court accepted the recommendations of the magistrate judge in their entirety and entered judgment dismissing the action. Wells timely appeals.

II. STANDARD OF REVIEW

We review a district court's grant of summary judgment de novo and must determine whether, viewing the evidence in the light most favorable to the non-moving party, there are any genuine issues of material fact and whether the district court correctly applied the substantive law. *Lopez v. Smith, 203 F.3d 1122, 1131 (9th Cir. 2000)* (en banc).

III. DISCUSSION

Whether shareholders of a professional corporation who are actively engaged in conducting the business of the corporation are "employees" under the ADA is an issue of first impression in this Circuit. Under the ADA, it is unlawful for a "covered entity" to discriminate against a qualified individual with a disability on the basis of that disability. *42 U.S.C. § 12112*(a). The term "covered entity" includes an "employer." Id. § 12111(2). An "employer" is defined as "a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year." Id. § 12111(5)(A). An "employee" is defined as "an individual employed by an employer." Id. § 12111(4).

No circuit has interpreted these specific provisions of the ADA. There are, however, a number of cases that interpret nearly identical language in other federal employment discrimination statutes, including Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act. These same cases also state that their interpretations should apply to all employment discrimination statutes. See e.g., *Serapion v. Martinez, 119 F.3d 982, 985 (1st Cir. 1997)*

("We regard Title VII, ADEA, ERISA, and FLSA as standing in pari passu and endorse the practice of treating judicial precedents interpreting one such statute as instructive in decisions involving another."); *Hyland v. New Haven Radiology Assocs., P. C., 794 F.2d 793, 796 (2d Cir. 1986)* (holding that for the FLSA, Title VII, and the ADEA, "cases construing the definitional provisions of one are persuasive authority when interpreting the others").

In *EEOC v. Dowd & Dowd, Ltd., 736 F.2d 1177 (7th Cir. 1984)*, the Seventh Circuit applied an "economic realities" test and concluded that "a shareholder in a professional corporation is far more analogous to a partner in a partnership than it is to the shareholder of a general corporation. " *Id. at 1178.* On this basis, the court concluded that because they are "really" partners, shareholders in professional corporations are not to be counted as employees for purposes of federal employment discrimination law. Id.

This approach was rejected by the Second Circuit in Hyland. In Hyland, the court held that the use of the corporate form, including a professional corporation, "precludes any examination designed to determine whether the entity is in fact a partnership." *794 F.2d at 798.* The incorporators of a professional corporation make a deliberate decision to adopt the corporate form for their business in order to avail themselves of important tax, employee benefit, and civil liability advantages. Id. Having freely made the choice to adopt this form of business organization "they should not now be heard" to say that their firm is "essentially a medical partnership," and not a corporation. Id.

Given the broad purpose of the ADA, see *42 U.S.C. § 12101*, we find Hyland's reasoning to be considerably more persuasive than Dowd's. Because the decision to incorporate is presumably a voluntary one, there is no reason to permit a professional corporation to secure the "best of both possible worlds" by allowing it both to assert its corporate status in order to reap the tax and civil liability advantages and to argue that it is like a partnership in order to avoid liability for unlawful employment discrimination. Therefore, following the Second Circuit's reasoning in Hyland, we hold that

Clackamas' shareholder-employees should be counted as" employees" under the ADA and "that any inquiry respecting partnership status [is] irrelevant." *Hyland, 794 F.2d at 798.*

Clackamas contends that *Strother v. Southern California Permanente Medical Group, 79 F.3d 859 (9th Cir. 1996)*, directs the court to use the "economic realities test" in this case. Strother, however, is distinguishable from this case and does not address the split between Dowd and Hyland regarding the status of shareholders of a professional corporation. In Strother, a case arising under state law, we held that partners can, under appropriate circumstances, be deemed to be employees for the purposes of the employment discrimination laws.

It is one thing to apply an "economic realities "test to determine that a nominal partner should, under appropriate circumstances, be considered an "employee" in order to prevent a firm from labeling the bulk of its employees as partners simply to insulate itself from liability for discrimination. It is quite another thing, however, to apply the "economic realities" test in order to classify shareholder-employees of a corporate enterprise as partners. See *Hyland, 794 F.2d at 798.* While the shareholders of a corporation may or may not be "employees," they can never be partners in that corporation because the roles are "mutually exclusive." Id.

In the case at bench, the status of Clackamas' four physician-shareholders as employees is clear. During the relevant time periods, in addition to being shareholders and directors of Clackamas, the four physician-shareholders actively participated in the management and operation of the medical practice and literally were employees of the corporation under employment agreements. Therefore, the physician-shareholders of Clackamas should be regarded as" employees" within the meaning of *42 U.S.C. § 12111*(4) & (5); consequently, Clackamas had a sufficient number of employees to qualify as an "employer" and as a "covered entity" under the statute.

IV. CONCLUSION

Because we conclude that Clackamas' physician-shareholders are employees of the corporation, not partners in it, the district court's grant of summary judgment in favor of Clackamas is reversed and the case is remanded for further proceedings consistent with this opinion.

REVERSED and REMANDED.

DISSENTBY:
Susan Graber Susan Graber . Graber

DISSENT:

GRABER, Circuit Judge, dissenting:

I respectfully dissent. For three reasons, *EEOC v. Dowd & Dowd, Ltd., 736 F.2d 1177 (7th Cir. 1984)*, expresses the more persuasive approach in the context of this case:[1] (1) our circuit has cautioned against being governed by labels, rather than realities; (2) a physicians' professional corporation in Oregon has many attributes of a partnership as a matter of law and is not merely an ordinary commercial corporation; and (3) the purpose of the numerical requirement in the ADA is to separate small from large enterprises, not to adhere to the vagaries of tax law or tort liability. Like the district court, I would apply the "economic realities" test and would conclude that Defendant's physician-shareholders were not" employees" within the meaning of the ADA.

1. The Significance of Strother

In *Strother v. Southern California Permanente Medical Group, 79 F.3d 859, 865-68 (9th Cir. 1996)*, we held that "partners" can be considered "employees "under a state anti-discrimination statute that borrowed concepts from federal law. There, a partner in a medical partnership consisting of more than 2,000 partners had sued the medical partnership. The district court held that the plaintiff could not maintain the action because she was a partner in the defendant entity and was a party to its partnership agreement. We reversed, holding that the plaintiff should have an opportunity to prove

that she was functionally an employee (for example, had neither the power nor the duty to participate in the management and the control of the defendant firm), rather than a partner in the normal sense. *Id. at 867-68.* We noted, for example, that the defendant entity was controlled by a board of directors over which the plaintiff exercised "little control and to which she [had] limited access." *Id. at 867.*

Although I agree that Strothers is not controlling here, it at least suggests that economic realities are more important than labels. That principle should remain true when the shoe is on the defendant's foot.

Indeed, even the Second Circuit has backed away a bit from the bright-line test suggested by *Hyland v. New Haven Radiology Assocs., P. C., 794 F.2d 793 (2d Cir. 1986).* In a later case, the Second Circuit observed that, although the shareholders of a professional corporation cannot be considered partners, it does not follow that every such shareholder also is an "employee" of the professional corporation. *EEOC v. Johnson & Higgins, Inc., 91 F.3d 1529, 1538 (2d Cir. 1996).* For example, if a shareholder sits on the board of directors but is not involved in the day-to-day management or operation of the firm, then the shareholder is more akin to an "employer," rather than being an "employee. "Id. This case brought the Second Circuit's approach somewhat closer to the Seventh Circuit's. See *Chavero v. Local 241, 787 F.2d 1154, 1157 (7th Cir. 1986)* (holding that members of the board of directors are not employees unless they "perform traditional employee duties"); *Zimmerman v. N. Am. Signal Co., 704 F.2d 347, 352 (7th Cir. 1983)* (holding that directors and "unpaid, inactive officers" are not corporate "employees"). In other words, "economic realities" play some role even in the Second Circuit, and Strother counsels that economic realities should play a major role in the Ninth Circuit.

2. The Nature of This Professional Corporation

A professional corporation has some attributes of an ordinary incorporated business, but it is not identical and retains attributes of a professional partnership. The use of the

word "corporation" in both contexts should not constrain our inquiry.

In Oregon, a physicians' professional corporation, like this one, preserves the professional relationship between the physicians and their patients, as well as the standards of conduct that the medical profession requires. Or. Rev. Stat. § 58.185(2). Further, "a shareholder of the corporation is personally liable as if the shareholder were rendering the service or services as an individual" with respect to all claims of negligence, wrongful acts or omissions, or misconduct committed in the rendering of professional services. Or. Rev. Stat. § 58.185(3) (emphasis added). A licensed professional also is jointly and severally liable for such claims, albeit with some dollar limitations. Or. Rev. Stat. § 58.185(4)-(9). Ordinary business corporation rules apply only to other aspects of the entity, apart from the provision of professional services. Or. Rev. Stat. § 58.185(11). A professional corporation's activities must remain consistent with the requirements of the type of license in question, Or. Rev. Stat. § 58.205, and it may merge only with other professional corporations, Or. Rev. Stat. § 58.196, so the provision of professional services – with its attendant liabilities – must remain at the heart of a P.C. like this defendant.[2]

Additional special rules apply to professional corporations that are organized to practice medicine, none of which apply to ordinary business corporations. A majority of the directors, the holders of the majority of shares, and all officers except the secretary and treasurer must be Oregon-licensed physicians. Or. Rev. Stat. § 58.375(1)(a)-(c). The Board of Medical Examiners is given express statutory authority to require more than a majority of shares, and more than a majority of director positions, to be held by Oregon-licensed physicians. Or. Rev. Stat. § 58.375(1)(d) & (e). The Board of Medical Examiners also may restrict the corporate powers of a professional corporation organized for the purpose of practicing medicine, beyond the restrictions imposed on ordinary business corporations. Or. Rev. Stat. § 58.379. Lastly, Or. Rev. Stat. § § 58.375 through 58.389 contain impediments to the transfer of shares and other corporate activities.

In short, even without considering the economic realities of this particular P. C., it is apparent that a physicians' professional corporation in Oregon retains important legal aspects of a partnership. On this record, it also is clear that the four physician-shareholders are the Defendant entity's directors, participate in the management and operation of the entity's medical practice, attend monthly management meetings, and share profits from the professional corporation through an annual bonus system. Because they in fact exercised full control over the medical practice, shared profits, and remained jointly and severally liable to patients on medically related claims, the physician-shareholders should be classified as partners, rather than employees.

3. The Reason for the ADA Classification

The apparent reason for limiting the ADA's coverage to entities with 15 or more employees in each of 20 or more calendar weeks in the current or preceding calendar year, *42 U.S.C. § 12111*(5)(A), is to divide larger businesses from smaller ones. Congress decided "to spare very small firms from the potentially crushing expense of mastering the intricacies of the antidiscrimination laws, establishing procedures to assure compliance, and defending against suits when efforts at compliance fail." *Papa v. Katy Indus., Inc., 166 F.3d 937, 940* (7th Cir.) (discussing the congressional purpose" of exempting tiny employers from the antidiscrimination laws," including the ADA), cert. denied, *528 U.S. 1019, 145 L. Ed. 2d 408, 120 S. Ct. 526 (1999)*; see also *Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 587 (9th Cir. 1993)* (recognizing that Congress exempted small employers from the ADEA and Title VII of the Civil Rights Act in order to protect them from "the costs associated with litigating discrimination claims").[3]

The result of the majority's opinion is that Clinic # 1, this defendant, is a "covered entity" for ADA purposes, while Clinic # 2 next door, which is identical in all respects except in its four physicians' decision not to adopt a P.C. format, is not a covered entity. Because the very purpose of the 15-employee threshold is economic, it makes no sense to treat Clinic # 1 and Clinic # 2 differently.

4. Conclusion

In my view, the Ninth Circuit should adopt the majority rule – an "economic realities" test – to determine whether a shareholder in a professional corporation is an" employee" within the meaning of the ADA. As Plaintiff and the panel majority acknowledge, if we applied that test to this case we would have to affirm the judgment of the district court. I therefore dissent from the decision to reverse and remand.

Footnotes

[1] The other circuits that have examined this question have followed the Seventh Circuit's approach in Dowd: *Devine v. Stone, Leyton & Gershman, P.C., 100 F.3d 78, 80-81 (8th Cir. 1996); Fountain v. Metcalf, Zima & Co., P.A., 925 F.2d 1398, 1400-01 (11th Cir. 1991).* It appears that no circuit other than the Second has adopted the Hyland approach.

[2] In Oregon, the distinction between partnerships of professionals and professional corporations is diminishing further. Oregon is currently phasing in a new set of statutes that will govern all Oregon partnerships after January 1, 2003. 1997 Or. Laws, ch. 775, § 84. Under Or. Rev. Stat. § 67.105(4), the liability of partners in a limited liability partnership of professionals will be governed by professional-corporation law:

> Notwithstanding subsection (3) of this section, the partners of a limited liability partnership who are professionals shall be personally liable in their capacity as partners to the same extent and in the same manner as provided for shareholders of a domestic professional corporation under ORS 58.185 and 58.187 and as otherwise provided in this chapter.

The fact that the law governing business entities is subject to a change that will result in having two differently named business structures share significant common features (as well as the fact that the law of business organizations varies from state to state) is an additional reason to adopt an

"economic realities" test instead of one that relies solely on labels.

[3] Additionally, Congress made a judgment about how large a business has a presumed effect on interstate commerce.

Civil No. 99-406-AS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DEBORAN ANNE WELLS,
Plaintiff,

v.

CLACKAMAS GASTROENTEROLOGY ASSOCIATES PC,
an Oregon corporation,
Defendants.

Filed May 5, 2000

ORDER

Magistrate Judge Donald C. Ashmanskas filed his Findings and Recommendation on March 22, 2000. The matter is now before me pursuant to 26 U.S.C. § 636(b) (1) (B) and Fed. R. Civ. P. 72(b). When either party objects to any portion of the Magistrate Judge's Findings and Recommendation, the district court must make a de novo determination of that portion of the Magistrate Judge's report. 28 U.S.C. § 636(b) (1) (C); McDonnell Douglas Corp. v. Commodore Business Machines, Inc., 656 F. 2d 1309, 1313 (9th Cir. 1981), cert. denied, 455 U.S. 920 (1982).

Plaintiff has filed timely objections. I have, therefore, given the file of this case a novo review. I ADOPT Magistrate Judge Ashmanskas's Findings and Recommendation. Defendant's motion (#9) for summary judgment, with respect to plaintiff's First Claim f or Relief, is granted. The remainder of defendant's summary judgment motion is denied as moot. Plaintiff 's Second and Third Claims for Relief are dismissed without prejudice.

IT IS SO ORDERED.

DATED this 5, day of May, 2000.

OWEN M. PANNER
U.S. DISTRICT COURT JUDGE

No. 00-35545

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEBORAN ANNE WELLS,
Plaintiff-Appellant,

v.

CLACKAMAS GASTROENTEROLOGY ASSOCIATES PC,
an Oregon corporation,
Defendant-Appellee.

DC# CV-99-00406-DCA
District of Oregon
(Portland)

Filed September 12, 2000

ORDER

This case is not selected for inclusion in the mediation program. Counsel are requested to contact the mediator should circumstances develop that might warrant further settlement discussions.

The briefing schedule previously established by the court remains in effect.

Chris Goelz
Circuit Mediator

9/11/00/cg

No. 00-35545

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEBORAN ANNE WELLS,
Plaintiff-Appellant,

v.

CLACKAMAS GASTROENTEROLOGY ASSOCIATES PC,
an Oregon corporation,
Defendant-Appellee.

DC# CV-99-00406-DCA
District of Oregon
(Portland)

Filed July 12, 2000

ORDER

This case is under consideration for inclusion in the mediation program. Within 14 days of the date of this order, counsel for all parties intending to file briefs in this matter are requested to inform Chris Goelz, Circuit Mediator, at Chris_Goelz@ca9.uscourts.gov (or by fax 206/553-4767) of their clients positions on whether the case is appropriate for mediation, whether the court should schedule an assessment conference, and whether the court could take other steps to facilitate settlement of the dispute. This communication will be kept confidential from the court and. if requested from the other parties in the case. The existing briefing schedule remains in effect.

Contact information and the procedures governing the mediation program are set out in the attached memorandum. Counsel should read the memorandum and provide a copy to their clients.

FOR THE COURT:
Lynn Warton Deputy Clerk

7/12/00/lw

Civil No. 99-406-AS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DEBORAN ANNE WELLS,
Plaintiff,

v.

CLACKAMAS GASTROENTEROLOGY ASSOCIATES PC,
an Oregon corporation,
Defendants.

Filed June 2, 2000

JUDGMENT OF DISMISSAL

OWEN M. PANNER, District Judge:

Consistent with the Order (# 43) of this court, filed May 5, 2000, adopting the Findings and

Recommendation (# 37) by U.S. Magistrate Judge Donald C. Ashmanskas, filed March 22, 2000, IT IS ORDERED and ADJUDGED that Plaintiff's case is DISMISSED with prejudice.

Pending motions, if any, are DENIED as moot.

DATED this 31, day of May 2000.

OWEN M. PANNER
U.S District Court Judge

Civil No. 99-406-AS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DEBORAN ANNE WELLS,
Plaintiff,

v.

CLACKAMAS GASTROENTEROLOGY ASSOCIATES PC,
an Oregon corporation,
Defendants.

Filed March 22, 2000

FINDINGS AND RECOMMENDATION

ASHMANSKAS, Magistrate Judge:

Plaintiff Deborah Wells brings this action against defendant Clackamas Gastroenterology Associates, P.C., her former employer. Plaintiff brings claims under the Americans With Disabilities Act (ADA), 42 TJS.C. § 12101 seq. and O.R.S. § 659.436, alleging that defendant unlawfully discriminated against her by refusing to reasonably accommodate her alleged disability and by terminating her employment. She also brings a claim for wrongful discharge. Presently before the court is defendant's motion for summary judgment.

STANDARDS

Summary judgment is only appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law Fed. R. Civ. P. 56(c). The moving party must show the absence of an issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1936). The moving party must support the summary judgment motion with affidavits made on personal knowledge, pleadings, depositions, answers to interrogatories

or admissions by party opponents sufficient to set forth all material facts required for summary judgment. Id. If the moving party adequately supports the motion, the adverse party may not rest upon the pleading, but must respond with affidavits made on personal knowledge, pleadings, depositions, answers to interrogatories or admissions by party opponents sufficient to demonstrate a genuine issue for trial. Id. at 322-23.

Reasonable doubts regarding the existence of a genuine issue of material fact arc resolved against the moving party. United States ex. Rel. Anderson v. Northern Telecom, Inc., 52 F.3d 810, 815(9th Cir. 1995). Inferences drawn from facts are viewed in the light most favorable to the non-moving party. Id.

A scintilla of evidence, or evidence that is merely colorable or not significantly probative, does not present a genuine issue of material fact. United Steelworkers of America v. Phelps Dodge Corp., 865 F.2d 1539, 1542 (9th Cir. 1989), cert. denied, 493 U.S. 809 (1989). No genuine issue for trial exists where the record as a whole could not lead the trier of fact to find for the non-moving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

The substantive law governing a claim determines whether a fact is material. Anderson v, Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Only disputes over facts that are relevant to an element of a claim or defense or whose existence might affect the outcome of the suit will properly preclude the entry of summary judgment. Id.

DISCUSSION

Defendant moves for summary judgment arguing, among other things, that defendant was not covered by the ADA during the relevant time period.

Under the ADA, it is illegal for a "covered entity" to discriminate against a qualified individual with a disability.

42 U.S.C. § 12112(a). An "employer" is one type of "covered entity." 42 U.S.C. § 12111(2). An "employer" must have 15 or more employees in each of 20 or more calendar weeks in the current or preceding calendar year. 42 U.S.C. § 1211 1(5)(A). An "employee" is defined as "an individual employed by an employer." 42 U.S.C. § 12111(4). Thus, in order for defendant to be covered by the ADA, it must have had 15 or more employees for 20 or more weeks during 1996 or 1997.

During the relevant time period, defendant was a professional corporation with four physician shareholders. It is undisputed that if the physician shareholders are not counted, defendant had 15 employees for only 10 weeks in 1996 and for only 8 weeks in 1997. In such a case, defendant would not be a "covered entity." Thus, the issue before the court is whether the physician shareholders of a professional corporation are "employees" under the ADA.

Plaintiff urges that a different test should be used to determine who is an employee under the ADA, depending upon whether the inquiry is coverage or the right to sue. I disagree. The ADA contains only one definition of "employee," and no indication that a different test should be used for coverage and the right to sue. Also, if different definitions were used, inconsistent results would be possible an individual who finds himself an "employee" for purposes of coverage, but with no right to sue, or vice versa). My conclusion is buttressed by an unpublished opinion from the Ninth Circuit that used the economic realities test[1] to differentiate between an employee and independent contractor for purposes of coverage under federal employment discrimination laws. Miller v. Lifestyle Creations, Inc., 993 F.2d 883, 1993 WL 173724 (9th Cir. 1993).

It is generally accepted that those who are properly classified as partners are not "employees" for purposes of the antidiscrimination statutes. See, Hishon v. King& Spaulding, 467 U.S. 69, 79 (1984); Burke v. Friedman, 556 F.2d 867, 869 (7th Cir. 1977). It is also generally accepted that corporate employees are employees under antidiscrimination statutes.

See, e.g., Archer v. Globe Motorists Supply Co., 833 F. Supp. 211, 213 (S.D.N.Y. 1993). However, the status of a shareholder in a professional corporation remains unsettled because its organizational structure is somewhere between a partnership and a regular corporation.

The Ninth Circuit has not addressed the specific issue of whether the shareholders of a professional corporation are employees for purposes of the antidiscrimination laws. It has, however, looked at the issue of whether under some circumstances a partner can be an employee. In Strother v. Southern California Permanente Medical Group, 79 F.3d 859 (1996), the Ninth Circuit considered whether a physician labeled as a partner can be considered an employee for purposes of bringing suit under federal employment discrimination laws. The court found that, in determining whether a partner can be an "employee," the court must

> analyze the true relationship among partners, including the method of compensation, the "partner's" responsibility for partnership liabilities, and the management structure and the "partner's" role in that management, to determine if an individual should be treated as a partner or an employee for the purpose of employment discrimination laws.

79 F.3d at 867.

In Strother, the medical partnership in which plaintiff was a partner had 2400-2500 partners. The affairs of the partnership were conducted predominantly by a board of directors, over which the plaintiff had little control and to which she had limited access. Her compensation was determined by her performance, and she could be disciplined for poor performance. Thus, the court remanded to the district court, finding that plaintiff must be given the opportunity to demonstrate that "her actual partnership rights are limited enough that she should be characterized as an employee." 79 F.3d at 868.

Other circuits have looked at the specific issue of whether shareholders in a professional corporation are "employees" for purposes of the antidiscrimination laws, and have come to differing conclusions. For example, in Equal Employment Opportunity Commission v, Dowd & Dowd. Ltd.. 736 F.2d 1177 (7th Cir. 1984), the court applied an economic realities test and determined that shareholders in a professional corporation engaged in the practice of law are not employees for purposes of federal employment discrimination laws. The court concluded that the role of a shareholder in a professional corporation is far more analogous to a partner in a partnership than it is to a shareholder of a general corporation. Id. at 1178. The court found that the economic reality of a professional corporation is that the management, control and ownership of the corporation is much like the management, control and ownership of a partnership. Id.

However, in Hyland v. New Haven Radiology Associates, 794 F.2d 793 2nd Cir. 1986), the district court applied an economic realities test and determined that the physician shareholders in a professional corporation were not employees for purposes of the federal employment discrimination laws. The circuit court reversed, and found the physician shareholders to be employees. The circuit court's position was that once the physicians had chosen a form of business organization (i.e., professional corporation), they were precluded from arguing that their corporation was essentially a medical partnership among co-equal physicians. Id. at 798. The court held that use of the corporate form precludes any examination designed to determine whether the entity more closely resembles a partnership. Id.

I find that the Dowd case is a better reasoned approach in that it exalts substance over form. With business entities evolving rapidly beyond the standard traditional forms (for example, the new limited liability companies and limited liability partnerships), the question of who is an employee will have to be looked at on the basis of economic realities, because the labels will not answer the question. Further, the Dowd approach is consistent with the approach set out in the

Ninth Circuit's analysis in Strother for the distinction between a true partner and an employee.

Strother directs the court to Look at the true relationship among the individuals, including the method of compensation, the responsibility for the entity's liabilities, and the management structure and role in that management, to determine if an individual should be treated as an employee for the purpose of employment discrimination laws. This is in effect an economic realities test.

The record in this matter indicates that the four physician shareholders of defendant constitute the board of directors. They own the professional corporation, and control the management and operations of the medical practice. They each share in the profits of the professional corporation by annual bonuses. Under Oregon law, they remain personally liable for malpractice claims against them, but have limited liability with respect to corporate obligations.

I conclude that the role of the four shareholders in the defendant professional corporation is that of employers who own and manage their own business. The economic reality is that they are more analogous to partners in a partnership than to shareholders in a general corporation. I conclude that the four physician shareholders are not employees for purposes of the federal antidiscrimination laws. Therefore, I recommend that defendant's motion for summary judgment with respect to the ADA coverage issue granted. There are no genuine issues of material fact. Defendant's physician shareholders are not employees for purposes of the ADA and, thus, the professional corporation is not covered by the ADA.

SUPPLEMENTAL JURISDICTION

28 U.S.C. § 1367, which applies to cases commenced after December 1, 1990, provides the basis for supplemental jurisdiction:

> Except as otherwise provided in subsection (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over ali other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

Subsection (c) of 28 U.S.C. § 1367 gives the court discretion to "decline to exercise" tile supplemental jurisdiction in various circumstances including when "the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3). The comments to the rule note;

Whether a dismissal of the touchstone claim should bring about a dismissal (or remand, in a removal situation) of the dependent claim for want of supplemental jurisdiction should hinge on the moment within the litigation when the dismissal of the touchstone claim takes place. . . . If for example, the main claim is dismissed early in the action, before any substantial preparation has gone into dependent claims, dismissing or remanding the latter upon declining supplemental jurisdiction seems fair enough.

28 U.S.C.A. § 1367, p. 224 (West Supp. 1991).

In this case, I use my discretion to decline to exercise supplemental jurisdiction over plaintiff's pendent state law claims since it is early in the case and no substantial preparation (other than that necessary to the ADA claim) has gone into the pendent state law claims. Thus, I recommend that plaintiffs pendent state law claims be dismissed without prejudice.

CONCLUSION

Defendant's motion (# 9) for summary judgment, with respect to plaintiff's First Claim for Relief; should be GRANTED. The remainder of defendant's summary judgment motion should be DENIED as moot. Plaintiff's Second and Third Claims for Relief should be DISMISSED without prejudice.

DATED this 22, day of March 2000.

DONALD C, ASHMANSKAS
United States Magistrate Judge

SCHEDULING ORDER

Objections to these Findings and Recommendation(s), if any, are due April 5, 2000. If no objections are filed, the Findings and Recommendation(s) will be referred to a district court judge and go under advisement on that date.

If objections are filed, the response is due no later than April 19, 2000. When the response is due or filed, whichever date is earlier, the Findings and Recommendation(s) will be referred to a district court judge and go under advisement.

Footnote

[1] The Ninth Circuit uses the "economic realities" test to determine employee status. Lutcher v. Musician Union Local 47, 633 F.2d 880, 883 (9th Cir. 1980).

No. 00-35545

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEBORAN ANNE WELLS,
Plaintiff-Appellant,

v.

CLACKAMAS GASTROENTEROLOGY ASSOCIATES PC,
an Oregon corporation,
Defendant-Appellee.

Lower Court Docket Number: CV-99-00406-DCA

Filed June 22, 2001

TIME SCHEDULE ORDER

-> The parties shall meet the following time schedule; Appellant/petitioner shall notify appellee/respondent of transcripts to be ordered, pursuant to Circuit Rule 10-3.1(a);

6/12/00

-> Appellee/respondent shall notify appellant/ petitioner of any additional transcripts needed, pursuant to Circuit Rule 10-3.1(b);

6/22/00

-> Appellant/petitioner shall file transcript order form with the district court and make payment arrangements with court reporter, pursuant to Circuit Rule 10-3.1;

7/3/00

-> Court reporter shall file transcript in the district court, pursuant to FEAP 11(b) and Circuit Rule 11-1.1;

8/2/00

Supreme Court, U.S.
FILED
JUN 12 2002
OFFICE OF THE CLERK

No. 01-1435

IN THE

Supreme Court of the United States

CLACKAMAS GASTROENTEROLOGY ASSOCIATES, P.C.,

Petitioner,

v.

DEBORAH WELLS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondent Debra Wells objects to the preliminary statement in petitioner's statement of the Question Presented. Though admitting that petitioner Clackamas Gastroenterology Associates, P.C. is a corporation, it claims the corporation "has legal attributes of a partnership." The corporate entity selected by petitioner in all respects is a corporation and has the legal attributes of a corporation. It is not a partnership.

The more appropriate question is the following:

> Whether the incorporators and directors of a professional corporation should be held to their selection of a corporate form of business structure, thereby making clear their legal obligations and responsibilities under the ADA and other federal anti-discrimination statutes.

In this case, the Ninth Circuit concluded that the physicians who elected the corporate form of business structure, wherein they were employees of the corporation, should be held to that decision, with its attendant responsibilities, adopting the bright line test set out by the Second Circuit.

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STATEMENT OF THE CASE

Respondent Wells was employed by petitioner medical clinic starting in 1986 and continuing until her termination in May 1997. Wells suffers from mixed connective tissue disorder, a debilitating and life-threatening disorder.

Respondent made several requests for reasonable accommodation. In April 1997 petitioner medical clinic demoted respondent to a receptionist position, at a location petitioner clinic knew respondent could not perform.

When respondent protested the discriminatory transfer, petitioner suggested respondent wells voluntarily quit by saying at least twice: "So, are you quitting then?" Because of petitioner's discriminatory treatment, respondent suffered an exacerbation of her medical condition and became unable to work. She consulted her physician, who took her off work until May 13, 1997. Respondent provided a copy of the medical release to respondent.

Despite the medical release extending to May 13, 1997, respondent clinic communicated to petitioner by letter dated May 6, 1997 that she would be terminated if she did not return to work by May 12, 1997, and further provided COBRA forms to petitioner containing a termination date of May 12, 1997.

On May 12, 1997, petitioner provided respondent with an extended medical authorization to be off work. Despite such notice, respondent terminated petitioner's employment, purportedly for her failure to report to work. Petitioner Wells could have continued to work with respondent medical clinic if it had provided the reasonable accommodations sought by

petitioner and had her condition not exacerbated due to the conduct of respondent. Petitioner's Statement of the Case contains the assertion that respondent Wells "voluntarily terminated" her employment. Respondent Wells considers that assertion to be factually inaccurate.

Petitioner is a professional corporation. The five physician shareholders are employees of the corporation, working under employment agreements. When added to the 13 to 14 employees regularly employed by petitioner other than physicians, the number of employees readily exceeds that required to bring petitioner under coverage of the ADA.

REASONS FOR DENYING THE WRIT

The Ninth Circuit correctly determined that when an employing entity elects the corporate form of organization, and the shareholders are employed by the corporation pursuant to written employment agreements, the shareholder-employees should be considered employees for purposes of determining the number of employees under the ADA.

When a business entity elects to take the corporate form, it undertakes certain obligations. The duty to observe corporate formalities, file corporate income taxes, and otherwise act as a corporation attends the corporate election. Having elected to exist as a corporation, with corporate employees rather than partners, petitioner should be held to that election.

A. Petitioner's Shareholder-Employees are Employees, Not Partners

The question of law presented in this case is narrow: When an employing entity elects the corporate form of organization, and the shareholders are employed by the corporation pursuant to written employment agreements, are the shareholder-employees considered employees for purposes of determining the number of employees under the ADA?

The plain text of the ADA imposes jurisdiction over employers with 15 or more *employees*. 42 U.S.C. § 12111(5)(A). The Ninth Circuit properly concluded that the statutory language requires consideration of the number of *employees*, not whether or not those employees might have some attributes of partners. The shareholder employees are not properly excluded from consideration in determining whether this corporate employer employs 15 or more persons.

In *Hyland, M.D. v. New Haven Radiology Associates, P.C.*, 794 F.2d 793 (2d Cir. 1986) (ADEA case), the court wrote:

> The fact that certain modern partnerships and corporations are practically indistinguishable in structure and operation, however, is not reason for ignoring a form of business organization freely chosen and established. * * * Having made the election to incorporate, [the physician members of NHRA] should not now be heard to say that their corporation is "essentially a medical partnership among co-equal radiologists."

> It is one thing to apply an economic realities test to distinguish an employee from an independent contractor or partner, but it is quite another to apply the test in an attempt to identify as partner one associated with a corporate enterprise. While those who own shares in a corporation may or may not be employees, they cannot under any circumstances be partners in the same enterprise because the roles are mutually exclusive.

Id. 794 F.2d at 798. In *Gorman v. North Pittsburgh Oral Surgery Associates, Ltd.*, 664 F. Supp. 212, 214 (W.D. Pa. 1987), the court explained:

> The professional corporation enjoys a unique existence among business combines, being a corporation for liability and tax purposes but a partnership in other respects. It enables a professional to employ him or herself and that is the only economic reality with which we need be concerned. We hold that the shareholders of NPOSA are employees of the professional corporation for ADEA purposes.

See also EEOC v. Johnson & Higgins, Inc., 91 F.3d 1529 (2d Cir. 1996).

It is undisputed that the five physicians associated with petitioner are employees, working under employment agreements. When added to the 13 to 14 employees otherwise admitted by the medical clinic, the number of employees readily exceeds that required to bring petitioner under coverage of the ADA.

B. Petitioner Should be Held to its Election to Incorporate

Some courts have focused upon the conflict that arises when shareholders or partners bring a claim against their employer — *i.e.*, against themselves. *E.g.*, *Devine v. Stone, Leyton & Gershman, P.C.*, 100 F.3d 78 (8th Cir. 1996); *Fountain v. Metcalf, Zima & Co.*, 925 F.2d 1398 (11th Cir. 1991) (both cited by petitioner). Those cases raise different analytical problems, as do cases involving the distinction between employees and independent contractors. It is one thing to determine that an owner of a business entity should be precluded from suing the entity he or she owns. It is yet another to determine that a lower level employee should be deprived the protection of employment discrimination laws by excluding shareholders who have elected to be employees of their professional corporation.

When a business entity elects the corporate form, it undertakes certain obligations. The duty to observe corporate formalities, file corporate income taxes, and otherwise act as a corporation attends the corporate election. Having elected to exist as a corporation, with corporate employees rather than partners, an entity such as this petitioner medical clinic should be held to that election. As the Ninth Circuit's Opinion below stated:

> Given the broad purpose of the ADA, see 42 U.S.C. § 12101, we find Hyland's reasoning to be considerably more persuasive than Dowd's. Because the decision to incorporate is presumably a voluntary one, there is no reason to permit a professional corporation to secure the "best of both possible worlds" by allowing it both to assert its corporate status in order to reap the tax and civil liability advantages and to argue that it is like a partnership in order to avoid liability for unlawful employment discrimination.

Wells v. Clackamas Gastroenterology Associates, P.C., 271 F.3d 903, 905 (9th Cir. 2001).

Indeed, "There is nothing inherently inconsistent between the coexistence of a proprietary and an employment relationship." *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. 28, 32, 81 S. Ct. 933, 936, 6 L. Ed. 2d 100 (1961) (shareholders in knitwear cooperative held to be employees under FLSA). In a variety of situations applying a remedial statute calling for the interpretation of the term "employee," an individual's status as a major stockholder, officer or director of a corporation has been found to be compatible with his or her status as an employee. *See, e.g., Zimmerman v. North American Signal Co.*, 704 F.2d 347, 350-54 (7th Cir. 1983). (ADEA respondent, a corporate vice president and one-third shareholder, considered as employee); *E.E.O.C. v. First Catholic Slovak Ladies Association*, 694 F.2d 1068, 1070 (6th Cir. 1982) (officer- directors held entitled to ADEA protections); *Novotny v. Great American Federal Savings & Loan Association*, 584 F.2d 1235, 1261 (3d Cir. 1978) (person holding positions of secretary and director held an employee for Title VII purposes), *vacated on other grounds*, 442 U.S. 366, 99 S. Ct. 2345, 60 L. Ed. 2d 957 (1979); *Hoy v. Progress Pattern Co.*, 217 F.2d 701, 704 (6th Cir. 1954) (one-eighth shareholder, vice president, director and chairman of board may be employee within purview of FLSA).

C. The Form of Business Structure Selected by Petitioner Should Not be Ignored

Petitioner medical clinic urges this Court to ignore the form of business selected by petitioner and its shareholders. This is not a "form over substance" problem. The corporate form of enterprise selected by petitioner is a very real

substantive matter. The petitioner incorporators could have selected a number of other forms of business structure, but elected to form a corporation. The substance of that election is that the corporation's shareholders are employees. Petitioner should be held to that election. *Hyland, M.D. v. New Haven Radiology Associates, P.C., supra*; *Gorman v. North Pittsburgh Oral Surgery Associates, Ltd., supra*; *EEOC v. Johnson & Higgins, Inc., supra.*

The Ninth Circuit was correct in deciding that a corporation is a corporation. The statutory language does not speak to "economic realities" but rather to "employees." Corporate employees are just that, not partners.

CONCLUSION

Respondent respectfully requests the Court to deny the Petition for Writ of Certiorari. If it does accept Certiorari to resolve a conflict among the circuits, the Court should use the opportunity to adopt a bright line test to guide those persons forming business entities as to their rights and responsibilities attendant to the election to incorporate, including that its employees will be counted for purposes of coverage of the ADA and similar anti-discrimination statutes.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JUN 24 2002

(3)

No. 01-1435

In the

Supreme Court of the United States

CLACKAMAS GASTROENTEROLOGY ASSOCIATES, P.C.,

Petitioner,

v.

DEBORAH ANNE WELLS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF

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8 pages

QUESTION PRESENTED

Clackamas Gastroenterology Associates, P.C. is a medical clinic formed as a professional corporation but which operates and has legal attributes of a partnership.

The question presented is whether a federal court should apply an economic realities test to determine if the Clinic's physician-shareholders are counted as "employees" for the purpose of determining if the Clinic is a "covered entity" subject to the ADA and other federal anti-discrimination statutes.

In this case, the Ninth Circuit concluded that the physician-shareholders are employees. The court below rejected the holdings of the Seventh, Eighth and Eleventh Circuits which used an economic realities test. Instead, it adopted the reasoning of the Second Circuit which rejected that test.

PARTIES TO THE PROCEEDINGS

Petitioner

Clackamas Gastroenterology Associates, P.C., an Oregon professional corporation. It has no parent corporation; and no publically held company owns ten percent or more of its stock.

Respondent

Deborah Ann Wells.

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A federal court should apply an economic realities test to determine if a person is an employee under the ADA whether the issue is coverage or right to sue.

CONCLUSION 3

TABLE OF AUTHORITIES

CASES

HYLAND V. NEW HAVEN RADIOLOGY ASSOCIATES, P.C.,
794 F.2D 793 (2ND CIR. 1986) 1

FOUNTAIN V. METCALF, ZIMA & CO., P.A.,
925 F.2D 1398, 1400-01 (11TH CIR. 1991) 1

DEVINE V. STONE, LEYTON & GERSHAM, P.C.,
100 F.3D 78, 80-81 (8TH CIR. 1996) 1

EEOC V. PEAT MARWICK, MITCHELL & COMPANY,
775 F.2D 928 (8TH CIR. 1985) 2

STROTHER V. SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP,
79 F.3D 859 (9TH CIR. 1996) 2

REPLY TO ISSUE FIRST RAISED IN BRIEF IN OPPOSITION

In her brief in opposition, the Respondent raises, by inference, a new, but related issue: whether a federal court should apply an economic realities test when a claimant's right to sue is at issue, but not when the ADA's coverage of a business entity is at issue. This stems from the notion that it is one thing to determine that an owner of a business should be precluded from suing the entity he or she owns, and another to deprive a "lower level employee" of the protection of the anti-discrimination laws.

Respondent implies that where, as here, a claimant has no ownership interest in the business entity, the Court's inquiry should stop at the form of business structure, but if the claimant has an ownership interest in the business entity, an economic realities test should be applied to determine whether the claimant should be treated as an employee.

Respondent's argument bears more on the merits of the case than on whether certiorari should be granted. This is not a distinction that reconciles the conflict among the Circuits. Cases which reject the use of an economic realities test include plaintiffs who are owners *Hyland v. New Haven Radiology Associates, P.C.*, 794 F.2d 793 (2nd Cir. 1986) and plaintiffs who are not owners (such as the instant case). Cases which apply an economic realities test include plaintiffs who are owners *Fountain v. Metcalf, Zima & Co., P.A.*, 925 F.2d 1398 (11th Cir. 1991) and plaintiffs who are not owners *Devine v. Stone, Leyton & Gershman, P.C.*, 100 F.3d 78 (8th Cir. 1996).

However, if, as Respondent argues, the issue is whether a Court's inquiry stops at the form of enterprise adopted by the business entity, then the impact on American business is substantially broader than just professional corporations with between fifteen and nineteen employees. Such a rule would affect entities such as large partnerships with hundreds or thousands of employees. Courts have often

held that the form of organization does not control whether an individual is an employee. In *EEOC v. Peat Marwick, Mitchell & Company*, 775 F.2d 928 (8th Cir. 1985), the EEOC was allowed to investigate by subpoena whether some of the 1,300 partners were in fact employees. In *Strother v. Southern California Permanente Medical Group*, 79 F.3d 859 (9th Cir. 1996) the Ninth Circuit applied an economic realities test to determine if the claimant had a right to sue; it held that a court must

> "[A]nalyze the true relationship among partners, including the method of compensation, the "partners" responsibility for partnership liabilities, and the management's structure in the "partners' role in the management, to determine if an individual should be treated as a partner or an employee for the purpose of employment discrimination laws."

Id. at 867.

In *Strother*, the medical partnership in which plaintiff was a partner had 2,400 to 2,500 partners. The affairs of the partnership were conducted predominantly by a board of directors, over which the plaintiff had little control and to which she had limited access. Her compensation was determined by her performance, and she could be disciplined for poor performance. The Ninth Circuit remanded to the District Court, finding that the plaintiff must be given the opportunity to demonstrate that "her actual partnership rights are limited enough that she should be characterized as an employee." Id. at 868.

The Respondent argues that the form of business structure selected by the entity should control. That approach, however, is inconsistent with cases like *Peat Markwick* and *Strother*. There is no reason to treat business entities differently based on whether the claimant has an ownership interest in the entity.

An economic realities test should determine not only whether partners, in reality, should be employees under the ADA; but also to determine whether shareholders of a P.C. should be, in reality, partners.

A federal court should apply an economic realities test to determine if a person is an employee under the ADA whether the issue is coverage (to determine if a shareholder in a P.C. is an employee under the anti-discrimination laws) or the issue is the right to sue (to determine if a partner is an employee under the anti-discrimination laws). There is no reason to disapprove the former and approve the latter.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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No. 01-1435

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CLACKAMAS GASTROENTEROLOGY ASSOCIATES, P.C.,

Petitioner,

v.

DEBORAH ANNE WELLS,

Respondent.

ON A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT FILED MARCH 26, 2002
CERTIORARI GRANTED OCTOBER 1, 2002

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3/23/99	1	COMPLAINT and JURY TRIAL DEMAND (Cause Code: 42:12101) (Receipt # 409729) (summons issued to Defendant-thru Merritt S Yoelin, agent) (tely) [Entry date 03/24/99]
3/23/99	2	ORDER Setting Discovery Schedule discovery due 7/21/99 pretrial order due 8/20/99 (tely) [Entry date 03/24/99]
5/20/99	3	ANSWER [1-1] and COUNTER-CLAIM by Defendant Clackamas Gastroent against Plaintiff Deborah Anne Wells (tely) [Entry date 05/21/99]
6/2/99	4	RECORD OF ORDER by Judge Donald C. Ashmanskas SETTING Rule 16 Conference via telephone for 9:15am on 8/5/99 (counsel notified) Court Rptr none (tely) [Entry date 06/03/99]
6/10/99	5	REPLY by Plaintiff Deborah Anne Wells to Defendants counterclaim [3-2] (tely) [Entry date 06/11/99]
7/8/99	6	NOTICE OF ADDRESS CHANGE by attorney Craig Crispin for Deborah Anne Wells (tely) [Entry date 07/12/99]
8/5/99	7	RECORD OF ORDER Of Telephone Rule 16 Conference by Judge Donald C. Ashmanskas ORDER extending discovery ddl to 10/22/99 & filing of dispositive motions ddl to 10/29/99. ORDER consent to trial before US Magistrate Judge is to be filed with the Court by 10/22/99. ORDER DEFERRING the lodging of the pretrial order until after the Court has rendered a decision on the dispositive motions (counsel notified) Court Rptr none (tely) [Entry

date 08/06/99] Edit date 06/07/00]

10/29/99 8 NOTICE OF FILING Motion for Summary Judgment by Defendant; (no certificate of service). (peg) [Entry date 11/01/99] [Edit date 11/01/99]

10/29/99 9 MOTION by Defendant FOR SUMMARY JUDGMENT; (no certificate of service). (peg) [Entry date 11/01/99] [Edit date 11/01/99]

10/29/99 10 MOTION by Defendant FOR SUMMARY JUDGMENT; (no certificate of service). (peg) [Entry date 11/01/99]

10/29/99 11 MEMORANDUM IN SUPPORT of Defendant's MOTION FOR SUMMARY JUDGMENT [9-1], [10-1]; (no certificate of service). (peg)[Entry date 11/01/99] [Edit date 11/01/99]

10/29/99 12 CONCISE STATEMENT OF MATERIAL FACTS in Support of Defendant's MOTION FOR SUMMARY JUDGMENT [9-1], [10-1]; (no certificate of service). (peg) [Entry date 11/01/99]

10/29/99 13 AFFIDAVIT of Timothy J. Resch, Esq. in Support of Defendant's MOTION FOR SUMMARY JUDGMENT [9-1], [10-1]; (no certificate of service).-(peg) [Entry date 11/01/99]

10/29/99 14 AFFIDAVIT of Bernice E. Thomas in Support of Defendant's MOTION FOR SUMMARY JUDGMENT [9-1], [10-1]; (no certificate of service). (peg) [Entry date 11/01/99]

10/29/99 15 AFFIDAVIT of Gale Dupell in Support of Defendant's MOTION FOR SUMMARY JUDGMENT [9-1], [10-1]; (no certificate of service). (peg) [Entry date 11/01/99]

11/1/99 16 RECORD OF ORDER by Judge Donald C. Ashmanskas SETTING Defendant's MOTION FOR SUMMARY JUDGMENT [9-1] on the under advisement motion of 12/13/99. (counsel notified) (peg) [Entry date 11/02/99]

11/2/99 17 CERTIFICATE OF SERVICE of affidavit [15-1], affidavit [14-1], affidavit [13-1], statement [12-1], memorandum [11-1], MOTION FOR SUMMARY JUDGMENT [10-1] by Defendant (peg) [Entry date 11/03/99]

11/12/99 18 UNOPPOSED MOTION by Plaintiff FOR EXTENSION OF TIME to Respond to Defendant's Motion for Summary Judgment [10-1], [9-1]. (peg) [Entry date 11/15/99]

11/12/99 19 AFFIDAVIT of Craig A. Crispin in Support of Plaintiff's MOTION FOR EXTENSION OF TIME to Respond to Defendant's Motion for Summary Judgment [10-1], [9-1] [18-1]. (peg [Entry date 11/15/99]

11/15/99 20 RECORD OF ORDER by Judge Donald C. Ashmanskas GRANTING Plaintiff's MOTION FOR EXTENSION OF TIME to Respond to Defendant's Motions for Summary Judgment [10-1][9-1][18-1] as follows: Response due by 11/24/99. (counsel notified) (peg) [Entry date 11/16/99]

11/26/99 25 RECORD OF ORDER by Judge Donald C. Ashmanskas GRANTING Plaintiff's counsel's letter request for an extension of time to and including 11/26/99, in which to file their response to Defendant's motion for summary judgment. (counsel notified) (peg)

[Entry date 12/01/99]

11/29/99 21 MEMORANDUM by Plaintiff IN RESPONSE to Defendant's MOTION FOR SUMMARY JUDGMENT [10-1],[9-1]; Oral Argument Requested; Reply due 12/13/99. (peg) [Entry date 11/30/99]

11/29/99 22 AFFIDAVIT of Craig A. Crispin in Support of Plaintiff's Response to Defendant's Motion for Summary Judgment [21-1]. (peg) [Entry date 11/30/99]

11/29/99 23 RESPONSE by Plaintiff to Defendant's Concise Statement of Material Facts [12-1]. (peg) [Entry date 11/30/99]

11/29/99 24 CERTIFICATE OF SERVICE of Plaintiff's Response [23-1], Affidavit [22-1], and Motion Response [21-1]. (peg) [Entry date 11/30/99]

11/29/99 26 RECORD OF ORDER by Judge Donald C. Ashmanskas DENYING as MOOT Defendant's MOTION FOR SUMMARY JUDGMENT [10-1] as it is a duplicate filing of docket entry [9-1]. ORDER: Defendant's MOTION FOR SUMMARY JUDGMENT [9-1] remains set on the Under Advisement Calendar of 12/13/99. (cnsl ntfd) (peg) [Entry date 12/01/99] [Edit date 12/01/99]

12/10/99 27 UNOPPOSED MOTION by Defendant FOR EXTENSION OF TIME to reply to Plaintiff's response to Defendant's Motion for Summary Judgment [9-1]. (peg) [Entry date 12/14/99]

12/10/99 28 AFFIDAVIT of Steven W. Seymour in Support of Defendant's UNOPPOSED MOTION FOR EXTENSION OF TIME to reply to Plaintiff's response to

Defendant's Motion for Summary Judgment [9-1] [27-1]. (peg) [Entry date 12/14/99]

12/10/99 29 CERTIFICATE OF SERVICE of Affidavit [28-1] and Motion [27-1] by Defendant. (peg) [Entry date 12/14/99]

12/20/99 30 REPLY TO Plaintiffs RESPONSE by Defendant Clackamas Gastroent re MOTION FOR SUMMARY JUDGMENT [9-1]; o/a requested (tely) [Entry date 12/22/99]

12/20/99 31 RECORD OF ORDER by Judge Donald C. Ashmanskas GRANTING Defendant's unopposed MOTION FOR EXTENSION OF TIME to 12/20/99 in which to reply to Plaintiff's response to Defendant's Motion for Summary Judgment [9-1] [27-1]; ORDER: RESETTING Defendant's MOTION FOR SUMMARY JUDGMENT [9-1] from the 12/13/99 calendar to the oral argument calendar of 9:00 AM on 1/31/00. (counsel notified) (Court Rptr: none) (peg) [Entry date 12/27/99]

1/26/00 32 RECORD OF ORDER by Judge Donald C. Ashmanskas: STRIKING Defendant's MOTION FOR SUMMARY JUDGMENT [9-1] from the 1/31/00 motion calendar; it will be reset upon compliance with LR 7. (counsel notified) Court Rptr: none (peg) [Entry date 01/27/00]

2/7/00 33 SUPPLEMENTAL CERTIFICATION OF COMPLIANCE by Defendant with LR 7.1 (peg) [Entry date 02/08/00]

2/7/00 34 RECORD OF ORDER by Judge Donald C. Ashmanskas SETTING defendants' MOTION FOR SUMMARY JUDGMENT [9-1] on oral argument calendar of 9:00

		AM on 3/20/00 (counsel notified) Court Rptr: none (peg) [Entry date 02/10/00]
12/10/00	35	RETURN OF SERVICE EXECUTED upon Defendant Clackamas Gastroenterology Assocciation, P.C. on 4/20/99 (peg)[Entry date 02/14/00]
3/20/00	36	RECORD OF PROCEEDINGS before Judge Donald C. Ashmanskas; ORDER: Defendant's MOTION FOR SUMMARY JUDGMENT [9-1] is taken under advisement this day, 3/20/00; ORDER: Findings and Recommendation to follow. (counsel notified) Court Reporter: Deirdre Neal (tape 522) (peg) [Entry date 03/22/00]
3/22/00	37	FINDINGS AND RECOMMENDATION by Judge Donald C. Ashmanskas as follows: Defendant's MOTION FOR SUMMARY JUDGMENT [9-1] with respect to plaintiff's First Claim for Relief, SHOULD BE GRANTED. The remainder of defendant's summary judgment motion SHOULD BE DENIED as moot. Plaintiff's Second and Third Claims for Relief SHOULD BE DISMISSED without prejudice. s/DCA 3/22/00 (cnsl ntfd); Due date for filing objections: 4/5/00 Due date for to objections: 4/19/00 (peg)
4/5/00	38	OBJECTIONS to FINDINGS & RECOMMENDATION [37-1] by Plaintiff (peg)
4/5/00	39	CERTIFICATE OF SERVICE re: Objections [38-1] to the F&R by Plaintiff (peg)
4/19/00	40	Response by Defendant to Plaintiff's Objections to Findings and

		Recommendation (peg)
4/19/00	41	CERTIFICATE OF SERVICE of Response to Objections [40-1] to Findings and Recommendation by Defendant (peg)
5/2/00	42	MINUTES OF ORDER by Judge Donald C. Ashmanskas REFERRING the Findings and Recommendation [37-1], the Objections [37-1] and the Response to the Objections [40-1] to the Honorable Owen M. Panner for review. (peg) [Entry date 05/04/00]
5/5/00	43	ORDER by the Honorable Owen M. Panner as follows: Plaintiff has filed timely objections and Defendant has filed a response to those objections. I have given the file of this case a de novo review. I ADOPT Magistrate Ashmanskas' Findings and Recommendation [37-1]. Defendant's Motion for Summary Judgment [9-1], with respect to plaintiff's First Claim for Relief, is granted. The remainder of defendant's summary judgment motion is denied as moot. Plaintiff's Second and Third Claims for Relief are dismissed without prejudice. IT IS SO ORDERED. Signed 5/5/00 (counsel notified) (peg) [Entry date 05/08/00]
5/23/00	44	RECORD OF ORDER by Judge Donald C. Ashmanskas: Telephone Status/Scheduling Conference set for 11:30 AM on 5/31/00 (counsel notified) Court Rptr: none (peg) [Entry date 05/25/00]
5/31/00	45	RECORD OF ORDER by Judge Donald C. Ashmanskas STRIKING the

Telephone Status Conference set for 5/31/00. (counsel notified) Court Rptr: none (peg) [Entry date 06/02/00]

6/2/00 46 JUDGMENT OF DISMISSAL: Consistent with the Order [43-1] of this court, filed 5/5/00, adopting the Findings and Recommendation [37-1] by US Magistrate Judge Donald C. Ashmanskas, filed 3/22/00, IT IS ORDERED and ADJUDGED that Plaintiff's case is DISMISSED with prejudice. Pending motions, if any, are DENIED as moot. Signed 5/31/00 by the Honorable Owen M. Panner; Microfilmed 6/2/00. (counsel notified) (peg)

6/2/00 47 NOTICE OF APPEAL to Court of Appeals by Plaintiff Deborah Anne Wells from the Judgment [46-2] which ADOPTED the Magistrate's Findings and Recommendation [37-1] that GRANTED in part Defendant's Motion for Summary Judgment Receipt # 430744 (peg) [Entry date 06/05/00]

6/2/00 48 REPRESENTATION STATEMENT by Plaintiff with attached Civil Appeals Docketing Statement. (peg) [Entry date 06/05/00]

6/7/00 -- NOTIFICATION OF APPEAL mailed to Court of Appeals For the document and docket sheet re: Appeal [47-1] filed on 6/2/00 by Plaintiff Deborah Anne Wells.. (peg)

6/16/00 49 TRANSCRIPT DESIGNATION AND ORDERING FORM for date(s) 3/20/00 re appeal filed 6/2/00 [47-1] (tely)

7/17/00 50 TRANSCRIPT of PROCEEDINGS HAD 3/20/00 of Motion for Summary

Judgment before Judge Donald C. Ashmanskas appeal [47-1] court reporter: Patricia Morgan (tely) [Entry date 07/18/00]

8/21/00 51 CERTIFICATE OF RECORD transmitted to US Court of Appeals for the Ninth Circuit re: Appeal by Plaintiff filed 6/2/00 [47-1] (wri)

CLERK'S RECORD on appeal (entire original file and transcripts) transmitted to US Court of Appeals for the Ninth Circuit regarding [47-1] Court of Appeals Number 00-35545. (cid)

MANDATE/JUDGMENT from USCA REVERSING AND REMANDING the Decision of the District Court [Appeal [47-1] (cid) [Entry date 12/28/01]

NO: 99-406-AS
UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

DEBORAH ANNE WELLS
Plaintiff,

V

CLACKAMAS GASTROENTEROLOGY ASSOCIATES,
P.C. an Oregon corporation,
Defendant.

COMPLAINT
(Americans with Disabilities Act; ORS 659.436-449;
Wrongful Discharge)

JURY TRIAL DEMANDED

NATURE OF THE ACTION

1. This is an action under Title I of the Americans with Disabilities Act of 1990.

Title I of the Civil Rights Act of 1991 to correct unlawful employment practices on the basis of disability, to vindicate plaintiff's rights and the rights of other qualified people with disabilities to fair treatment and equal opportunity, and to make plaintiff whole. Plaintiff is a qualified individual with a physical impairment, which substantially limits her in one or more major life activities. Defendant discriminated against plaintiff in

the terms and conditions of her employment, refused to accommodate plaintiff's disability, and discharged plaintiff from her position of employment because of her disability.

2. This is also an action for violation of the Oregon State Disability Discrimination law, ORS 659.436-.449, pursuant to the court's supplemental jurisdiction.

JURISDICTION AND VENUE

3. This court has jurisdiction over the subject matter of this complaint pursuant to 28 U.S.C.§ 1331. This action is authorized and instituted pursuant to Section 107(a) of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12 117(a) and pursuant to Section 102 of the Civil Rights Act of 1991, 42 U.S.C. § 1981(A).

4. The court has jurisdiction over plaintiff's state law claims set forth in this complaint pursuant to its supplemental jurisdiction to hear related state law claims under 28 U.S.C. § 1367(a). Both the federal and state claims alleged herein arose from a common nucleus of operative fact, the state action is so related to the federal claim that they form part of the same case or controversy, and the actions would ordinarily be expected to be tried in one judicial proceeding.

5. The employment practices alleged herein were committed in the District of Oregon.

PARTIES

6. Plaintiff Deborah Anne Wells is a resident and citizen of the State of Oregon.

7. Defendant Clackamas Gastroenterology Associates, P.C. is an Oregon corporation of licensed physicians.

8. Defendant employs and has employed during the relevant periods more than 15 employees. At all material times defendant was and is an employer within the meaning of 42 U.S.C.§ 1211 1(5)(A), ORS 659.400 and ORS 659.0 10.

PROCEDURAL REQUIREMENTS

9. Plaintiff has filed charges of unlawful employment practices with the Oregon Bureau of Labor and Industries, Civil Rights Division ("CRD"), and complaints with the Equal Employment Opportunity Commission ("EEOC") raising the issues complained of herein.

10. Plaintiff has received a Notice of Private Right of Action from the Oregon CRD and a Notice of Right to Sue from the EEOC authorizing plaintiff to commence a civil action. Plaintiff has timely filed her complaint following her receipt of notices authorizing her to bring these actions.

FACTUAL ALLEGATIONS

11. Plaintiff was employed by defendant on a part time basis in 1984 and subsequently on a full time basis beginning in 1986 as bookkeeper in defendant's Oregon City, Oregon office. Plaintiff worked in this position until her involuntary termination on or about May 12, 1997.

12. In February 1997, plaintiff received a diagnosis of mixed connective tissue disorder and advised her employer of the diagnosis.

13. Due to her mixed connective tissue disorder, plaintiff suffers severe reactions to the immune system, circulatory system and internal organs and symptoms including muscle weakness, shortness of breath, fatigue, high blood pressure, trouble swallowing due to esophageal narrowing, and hardening of the skin and veins. The disease causes a risk of vein collapse.

14. Plaintiff at all material times, was a disabled person in that she suffers from a chronic condition, a physical impairment affecting one or more of her bodily systems, including her circulatory, musculature, hematic, skin, and immune systems.

15. Plaintiff's physical impairment causes a substantial limitation on one or more major life activities, including caring for herself performing manual tasks, walking, breathing, eating and working, in that she is significantly restricted as to the condition, manner or duration under which she can perform such major life activities as compared to the condition, manner or duration under which the average person in the general population can perform those same major life activities.

16. Despite her physical impairment, plaintiff was able to the essential functions of her job with reasonable accommodation.

17. Defendants regarded and treated plaintiff as a person with an impairment that substantially limited one or more major life activities. Plaintiff's ability to perform the essential functions of her position with defendants

was limited as a result of the attitude of defendant toward her impairment.

18. As a result of her disability, plaintiff began to suffer increasing fatigue in January 1997 and requested defendant to provide her assistance with her increasing workload and to change her hours of work to allow her to leave at 3:30 p.m.

19. In early March 1997, plaintiff again requested that her employer hire some part time help to assist her or otherwise to relieve her excessive workload, but defendant refused to provide the requested assistance.

20. In late March 1997, defendant reassigned plaintiff to receptionist duties in its Milwaukie, Oregon office for four days per week. Plaintiff protested the transfer and advised defendant of her inability to perform in the new position due to her disability. Plaintiff requested reasonable accommodation in connection with the reassignment, but defendant refused.

21. Plaintiff attempted to perform her reassigned duties, but her symptoms worsened during April 1997 due to defendant's failure to provide reasonable accommodation. On or about April 23, 1997, plaintiff again sought reasonable accommodation regarding her assigned work location and work duties, and defendant responded by reassigning her to yet another, less suitable location.

22. Plaintiff's doctor put her on medical leave on April 25, 1997 and plaintiff timely notified defendant. Defendant terminated plaintiff's employment on May 12. 1997, while on medical leave.

FIRST CLAIM FOR RELIEF

(Title I of the Americans with Disabilities Act)

23. Plaintiff incorporates by reference the allegations of paragraphs 1 through 22.

24. Plaintiff was qualified for her position of employment with defendant and was able to and did perform the essential functions of such position, except as caused by defendant's failure to provide reasonable accommodation.

25. Upon defendant's learning of plaintiff's impairment and disability with a chronic disease, defendant began subjecting plaintiff to adverse terms and conditions of employment.

26. Plaintiff repeatedly requested reasonable accommodations necessary to perform the essential functions of her position.

27. Plaintiff's requested accommodations were reasonable and readily available to defendant, but defendant refused to provide them or otherwise to accommodate the effects of plaintiff's disability.

28. In response to plaintiff's requests for accommodation, defendant retaliated against plaintiff by reassigning her to less desirable and more physically demanding assignments.

29. When on April 23, 1997 plaintiff was reassigned to the Tualatin office, she advised defendant that the long drive and scheduled work hours would be too difficult for her due to her disability. Defendant responded by suggesting to plaintiff that she quit.

30. On April 24, 1997, plaintiff had to leave work to consult her doctor concerning an elevated heart rate and elevated blood pressure.

31. Plaintiff's doctor authorized plaintiff to remain off work on medical leave from April 25 to May 12, 1997, and plaintiff notified defendant accordingly.

32. On May 6, 1997, defendant advised plaintiff by letter that her medical absence was causing a "hardship" on the company and that plaintiff would be terminated on May 12, 1997 should she not return to work on that day.

33. On May 12, 1997, plaintiff's doctor authorized plaintiff an additional period of medical leave, and plaintiff notified defendant.

34. Defendant terminated plaintiff on May 12, 1997 for the purported reason that plaintiff failed to report to work. Such reason was a pretext for illegal discrimination.

35. Defendant subjected plaintiff to adverse employment conditions due to her disability.

36. Defendant's termination of plaintiff's employment was due to her disability.

37. As a result of defendant's conduct, plaintiff has suffered lost wages plus benefits of employment from the date of her termination through the date of filing, and will continue through the date of trial to suffer lost wages and benefits in an amount to be established at trial.

38. Plaintiff is entitled to be reinstated to employment by defendant. If reinstatement is not feasible, plaintiff is entitled to an award for damages for future lost wages and benefits of employment, and lost earning capacity.

39. Plaintiff is entitled to a permanent injunction enjoining defendant, its owners, officers, management personnel, employees, agents, successors, and assigns, and all persons in active concert or participation with defendant, from engaging in any employment practice which discriminates on the basis of disability.

40. As a further result of defendants' intentional acts alleged herein, plaintiff suffered severe emotional distress, mental pain and anguish, embarrassment, loss of dignity and self- esteem, sleeplessness, nausea and headaches, humiliation, and loss of enjoyment of life for which plaintiff should recover the sum of $500,000, or such amount as may be available under applicable law.

41. Defendant's acts were done intentionally with an improper, abusive, discriminatory, and retaliatory motive, and with reckless indifference to plaintiff's state and federally protected rights. Such conduct should not be tolerated by this society, and punitive damages in the amount of $500,000, or as otherwise fixed by a jury and available under applicable law, should be awarded to punish defendants and deter such conduct in the future.

42. Plaintiff is entitled to an award of attorney's fees, expert witness fees and costs incurred herein, pursuant to one or more of the following: 42 U.S.C. § 12205, ORS 659.121, ORS 20.107.

SECOND CLAIM FOR RELIEF

(Unlawful Employment Practices ORS 659.436-449)

43. Plaintiff incorporates by reference the allegations of paragraphs 1 through 42.

44. Defendant's acts as alleged herein are motivated by and due to plaintiff's disability and constitutes unlawful employment practices under ORS 659.436-449.

THIRD CLAIM FOR RELIEF

(Wrongful Discharge)

45. Plaintiff incorporates by reference the allegations of paragraphs 1-41 and 44.

46. Plaintiff resisted and protested defendant's discriminatory treatment of her related to her disability and requests for accommodation.

47. Defendant's termination of plaintiff was in retaliation for plaintiffs pursuit of her rights related to her role as an employee, which rights are of important public interest, and for which plaintiff should recover from defendant as alleged herein.

48. Plaintiff is entitled to recover her costs of suit and her reasonable attorney fees, costs and expert witness fees pursuant to ORS 20.107.

PRAYER FOR RELIEF

WHEREFORE, plaintiff requests the court to:

49. Assume jurisdiction over each of the causes set forth herein.

50. Grant a permanent injunction enjoining defendant, its owners, officers, management personnel, employees, agents, successors, and assigns, and all persons in active concert or participation with defendant, from engaging in any employment practice which discriminates on the basis of disability or in anticipation of the use of protected medical leave, on such terms as the court may direct.

51. Order defendant to carry out and institute policies, practices and programs providing for equal employment opportunities to qualified individuals with disabilities and which affirmatively eradicate the effects of past and present unlawful employment practices, on such terms as the court may direct.

52. Order defendant to reinstate plaintiff to her position of employment or if such reinstatement is not feasible, to award plaintiff compensation for lost earning capacity and future earnings and benefits of employment in such amounts as are determined at trial.

53. Order defendant to make plaintiff whole by compensating her for past and future pecuniary losses, including expenses, lost past earnings and benefits of employment, and medical and health care expenses caused by plaintiff's loss of employment, all in such amounts as are determined at trial.

54. Order defendant to make plaintiff whole by providing compensation for nonpecuniary losses, including physical and emotional pain and suffering, mental anguish, humiliation, and embarrassment, and loss of enjoyment of life in amounts as are determined at trial.

55. Order defendant to pay plaintiff punitive damages

in an amount to be determined at trial.

56. Award plaintiff her costs of suit and her reasonable attorney fees, costs and expert witness fees pursuant to 42 U.S.C. § 12205. ORS 659.121. and ORS 20.107.

57. Order defendant to pay prejudgment and postjudgment interest on all amounts due to plaintiff as a result of this action.

58. Order such further or alternative relief in favor of plaintiff as the court deems appropriate.

JURY TRIAL DEMAND

Plaintiff demands a jury trial on all questions of fact or combined questions of law and fact raised by this complaint.

CRISPIN & ASSOCIATES

By:_____
Craig A. Crispin, OSB No. 82485
Telephone: 503.224.2007
Facsimile: 503.224.0517
Of Attorneys for Plaintiff

(Certificate or affidavit of service omitted in printing).

NO: 99-406-AS
UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

DEBORAH ANNE WELLS
Plaintiff,

V

CLACKAMAS GASTROENTEROLOGY ASSOCIATES,
P.C. an Oregon corporation,
Defendant.

ANSWER, AFFIRMATIVE DEFENSE AND COUNTER-CLAIM

As an answer to Plaintiff's Complaint, Clackamas Gastroenterology Associates, P.C., Defendant. admits, denies and alleges as follows:

1. Defendant admits paragraphs 3 and 7 of Plaintiff's Complaint.

2. Defendant denies paragraphs 6, 10, 12, 13, and 30 of Plaintiff's Complaint for lack of information and belief.

3. As to paragraph 1 of Plaintiff's Complaint, Defendant admits that the Plaintiff's Complaint includes an action under Title I of the Americans with Disabilities Act of 1990 and Title I of the Civil Rights Act of 1991 and denies the balance of paragraph 1.

4. As to paragraph 2 of Plaintiff's Complaint, Defendant admits that Plaintiff's Complaint contains a claim for violation of the Oregon State Disability Discrimination Law, ORS 659.436-499, and denies the balance of paragraph 2.

5. As to paragraph 9 of Plaintiff's Complaint, Defendant admits that Plaintiff filed charges of unlawful employment practices with the Oregon Bureau of Labor and Industries, Civil Rights Division and complaints with the Equal Employment Opportunity Commission as to Americans with Disabilities Act and the Civil Rights Act of 1991, and denies the balance of paragraph 9.

6. As to paragraph 22 of Plaintiff's Complaint, Defendant admits that the Plaintiff was placed on medical leave on April 25, 1997 and denies the balance of paragraph 22.

7. As to paragraph 31 of Plaintiff's Complaint, Defendant admits that it received a facsimile transmission from Valley View Medical Clinic advising that Plaintiff had no evidence of a contagious or infectious disease and was physically able to return to work, school and sports, and that time loss was authorized from April 25 through May 12, 1997, and denies the balance of paragraph 31.

8. As to paragraph 32 of Plaintiff's Complaint, Defendant admits that it sent a letter to the Defendant dated May 6, 1997, the content of which speaks for itself, and denies the balance of paragraph 32.

9. Defendant denies all other allegations of Plaintiff's Complaint.

AFFIRMATIVE DEFENSE TO PLAINTIFF'S FIRST AND

SECOND CLAIMS

10. Defendant made a good faith effort to identify and make reasonable accommodation for any alleged disability of Plaintiff.

COUNTERCLAIMS FOR ATTORNEY'S FEES

11. Defendant is entitled to an award of attorney's fees, expert witness fees and costs incurred herein, pursuant to one or more of the following: 42 USC § 12205 and ORS 20. 107.

WHEREFORE, Defendant prays for judgment dismissing Plaintiff's Complaint and awarding its attorney's fees, expert witness fees, costs and disbursements incurred herein.

DATED this _____day of May, 1999.

BY_____
Steven W. Seymour, OSB #75332
Of Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing ANSWER, AFFIRMATIVE DEFENSE AND COUNTERCLAIM on the following:

Craig A. Crispin
CRISPIN & ASSOCIATES
300 Jefferson Station
1230 SW First Avenue
Portland, OR 97204

by mailing a true and correct copy thereof. I further certify that said copy was contained in a sealed envelope with postage prepaid, addressed to the last known address as above stated and deposited in the post office at Portland, Oregon, on the 19th day of May, 1999.

By_____
Steven W. Seymour, OSB #75332
Of Attorneys for Defendant

NO: 99-406-AS
UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

DEBORAH ANNE WELLS
Plaintiff,

V

CLACKAMAS GASTROENTEROLOGY ASSOCIATES,
P.C. an Oregon corporation,
Defendant.

PLAINTIFF'S REPLY
To Defendant's Counterclaim

Plaintiff Deborah Anne Wells, in reply to defendant Clackamas Gastroenterology Associates, P.C.'s counterclaim, states as follows:

REPLY TO COUNTERCLAIM

1.

Plaintiff denies that defendant is entitled to recover attorney fees, expert witness fees or costs pursuant to 42 USC § 12205, ORS 20.107, or by any other means.

2.

Defendant's counterclaim is without foundation in fact or law, is asserted in bad faith for oppressive reasons,

and plaintiff is entitled to appropriate remedies.

3.

Defendant is entitled to no relief under its counterclaim.

CONCLUSION

Having fully replied to defendant's counterclaim, plaintiff prays for judgment in her favor dismissing the counterclaim asserted against her and awarding her costs and reasonable attorney fees.

CRISPIN & ASSOCIATES
By:_____
Craig A. Crispin, OSB NO. 82485
Of Attorneys for Plaintiff
Telephone: 503.224.2007
CERTIFICATE OF SERVICE

I certify that the foregoing Plaintiff's Reply to Defendant's Counterclaim was served on:

Steven W. Seymour
SAMUELS Y0ELIN KANTOR SEYMOUR & SPINRAD LLP
4640 SW Macadam Avenue, Suite 200
Portland, OR 97201

by mailing a true copy thereof, addressed as above, contained in a sealed envelope with postage prepaid,

and this date deposited in the post office in Portland, Oregon.

DATED: June 10th 1999.

By:_____
Craig A. Crispin, OSB No. 82485
Of Attorneys for Plaintiff
Telephone: 503.224.2007

NO: 99-406-AS
UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

DEBORAH ANNE WELLS
Plaintiff,

V

CLACKAMAS GASTROENTEROLOGY ASSOCIATES,
P.C. an Oregon corporation,
Defendant.

MOTION FOR SUMMARY JUDGMENT BY DEFENDANT

Defendant, by and through Steven W. Seymour of Samuels Yoelin Kantor Seymour & Spinrad LLP, its attorneys, hereby moves the Court to enter Summary Judgment for Defendant, in accordance with the provisions of Rule 56 (b) and (c) of the Rules of Civil Procedure, on the grounds that the pleadings, Affidavits, and Exhibits A and B show that there is no genuine issue of material fact and that the Defendant is entitled to a judgment as a matter of law.

DATED this _____day of October, 1999.

By:_____
Steven W. Seymour, OSB #75332
Of Attorneys for Defendants

(Certificate or affidavit of service omitted in printing).

NO: 99-406-AS
UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

DEBORAH ANNE WELLS
Plaintiff,

V

CLACKAMAS GASTROENTEROLOGY ASSOCIATES,
P.C. an Oregon corporation,
Defendant.

CONCISE STATEMENT OF MATERIAL FACTS IN SUPPORT OF SUMMARY JUDGMENT MOTION

Pursuant to LR 56.1 (a)(2), Defendant submits the following Statement of Material Facts as to which it contends there is no genuine issue, and which entitle Defendant to summary judgment of dismissal with prejudice.

1. Defendant is a professional corporation, specializing in gastroenterology. Defendant's main office is in Oregon City. Defendant subleases space in Milwaukee (the Milwaukee satellite office), and has a location in Tualatin (the endoscopy center). (Exhibit B, Dupell Deposition, pp 51, 58).

2. Defendant did not employ 15 or more employees for at least 20 weeks in either 1996 or 1997. (Dupell Affidavit, p. 2).

3. Dr. Robert Wollmuth, Dr. Jon Mason, Dr. William Ferrin, and Dr. Michael Sheffield are shareholders and

directors of Defendant, actively participate in the management of Defendant's business, and share in the profits from Defendant's business. (C, Dupell Affidavit, p. 2).

4. Defendant employed Plaintiff as a bookkeeper in Defendant's gastroenterology medical practice. (Exhibit A, Wells Deposition, p. 12).

5. Plaintiff's duties included bookkeeping, patient billing and collections, and coverage assignments, as described in more detail on a document titled "Job Description: Bookkeeper and Patient Collections." Such duties constituted the essential functions of Plaintiff's job. (Exhibit A, Wells Deposition, p. 14; Exhibit A, Wells Deposition ex. 3).

6. Plaintiff participated in, and had an interactive role in the drafting process of her job description. (Exhibit B, Dupell Deposition, pp. 14-15).

7. Plaintiff was unable, without reasonable accommodation, to perform the essential functions of her job as a bookkeeper. (Exhibit A, Wells Deposition, p. 24).

8. Plaintiff's replacement as a bookkeeper, Ms. Bernice Thomas, is performing the same duties as Plaintiff, in addition to some extra functions that Plaintiff did not perform. (Thomas Affidavit, p. 2).

9. Plaintiff's only requested accommodation was that Defendant hire additional staff to assist with the essential functions of Plaintiff's job. (Exhibit A, Wells Deposition, pp. 24, 79).

10. Hiring an additional person to assist Plaintiff with

her duties would constitute an undue hardship to Defendant. (Dupell Affidavit, p. 3).

11. On April 24, 1997, Defendant offered Plaintiff a transfer to Defendant's Tualatin office. Defendant's offer of a transfer was a reasonable accommodation for Plaintiff's disability. (Exhibit A, Wells Deposition, pp. 44-45).

12. The patient coordinator/receptionist job at Defendant's Tualatin office was easier and less stressful than Plaintiff's bookkeeper job. (Exhibit B, Dupell Deposition, p. 51).

13. Plaintiff rejected Defendant's offer of a transfer to Defendant's Tualatin office. Plaintiff rejected the transfer because the receptionist position was humiliating, and because she did not want to commute to Tualatin. (Exhibit A, Wells Deposition, pp. 46-48)

14. Plaintiff left work on April 24, 1997, never returned to work after that date, and never offered to return to work. (Exhibit A, Wells Deposition, pp. 66-67).

15. Defendant's personnel policy provides that two consecutive unexcused absences will be treated as a voluntary termination on the part of the employee. (Exhibit A, Wells Deposition, ex. 10).

16. Plaintiff's physician provided Plaintiff with a medical release, authorizing her leave from work from April 28, 1997 through May 12, 1997. (Exhibit B, Dupell Deposition, ex. 113).

17. Defendant was not aware, at any time in May or June of 1997, that Plaintiff received a medical release extending beyond May 12, 1997. (Exhibit B, Dupell

Deposition, p. 41)

18. Defendant sent a letter to Plaintiff on May 6, 1997, which Plaintiff received on or about May 8, 1997. This letter provided information to Plaintiff about her disability insurance. Defendant also inquired as to whether Plaintiff would be returning to work on May 12, 1997. (Exhibit A, Wells Deposition, p. 78; Exhibit A, Wells Deposition ex. 13).

19. Plaintiff did not return to work on either May 12, May 13, May 14, or May 15,1997. (Exhibit B, Dupell Deposition, p. 67).

20. Plaintiff filed a disability claim with Unum Insurance company. (Exhibit A, Wells Deposition, p. 74; Exhibit A, Wells Deposition ex. 12).

21. Plaintiff appealed Unum Insurance Company's denial of her disability claim by sending Unum a letter dated August 13, 1997. In this letter, Plaintiff state that she was unable to work at all. (Exhibit A, Wells Deposition, p. 91-92; Exhibit A, Wells Deposition ex. 17).

22. Plaintiff's attending physician, Dr. Michelle Adamcak, wrote a letter dated August 7, 1997, which stated "At this time, [Plaintiff] is unable to do any work, even work that is sedentary." (Exhibit A, Wells Deposition, p. 96; Exhibit A, Wells Deposition ex. 18).

All exhibits referred to herein are attached to Defendant's Memorandum in Support of its Motion for Summary Judgment. For clarity, all page numbers refer to the deposition transcript page number, or the affidavit page number.

DATED this_____ day of October, 1999.

By:_____
Steven W. Seymour, OSB #75332
Of Attorneys for Defendants

(Certificate or affidavit of service omitted in printing).

NO: 99-406-AS
UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

DEBORAH ANNE WELLS
Plaintiff,

V

CLACKAMAS GASTROENTEROLOGY ASSOCIATES,
P.C. an Oregon corporation,
Defendant.

AFFIDAVIT OF GALE DUPELL IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I, Gale Dupell, being first duly sworn, depose and say as follows:

1. I became employed as the Administrator for Clackamas Gastroenterology Associates, P.C. on August 8, 1994, and have been so employed from that date to the present.

2. I graduated with a Bachelor of Arts in Public Administration from Washington State University in 1974. I received a Masters of Business Administration from the University of Portland in 1992. I have previously been employed as a cost accountant for First Interstate Bank; I was a case mix manager for Legacy Health Systems; I was the administrator of anesthesiology for Oregon Health Sciences University from approximately 1989 until August, 1994.

3. I had a temporary employee review the payroll records for Clackamas Gastroenterology Associates, P.C. for calendar years 1996 and 1997. Attached is a true and correct copy of a spreadsheet I had prepared, which summarizes the total number of employees for each week in calendar years 1996 and 1997.

4. The work week for Clackamas Gastroenterology Associates, P.C. is Monday through Friday. The attached spreadsheet demonstrates that Clackamas Gastroenterology Associates, P.C. had 15 employees for 10 weeks in calendar year 1996, and 8 weeks in calendar year 1997.

5. Since July, 1994, and for all material times relevant to the above entitled proceeding, the shareholders and directors of Clackamas Gastroenterology Associates, P.C. were; Robert L. Wollmuth, M.D., S. Jon Mason, M.D., William M. Ferrin, M.D., and Michael F. Sheffield, M.D.

6. The shareholders and directors participate in the management and operations of the medical practice of Clackamas Gastroenterology Associates, P.C., and attend monthly board meetings. The shareholders and directors share profits from the professional corporation by an annual bonus.

7. For all material times relevant to the above entitled proceeding, my duties as Administrator included supervising all personnel at Clackamas Gastroenterology Associates, P.C. I am responsible for management of personnel, including hiring and firing decisions in conjunction with input from the board of directors.

8. I have reviewed the Job Description: Bookkeeper

and Patient Collections, marked Exhibit 3 for the Wells Deposition. I prepared this Job Description, after receiving input from Deborah Wells on the job duties and responsibilities for the bookkeeper position.

9. I was responsible for assigning office personnel to occasionally cover the patient coordinator/receptionist position at the Milwaukee satellite office. I decided to assign Deborah Wells to cover the receptionist position at the satellite office because she could perform her other duties, like patient collections, while at that position. While Ms. Wells was covering the satellite office, I took over her posting duties, a significant portion of her job.

10. I was responsible for the decision to offer Deborah Wells a transfer to the Tualatin satellite office. I made this decision because Ms. Wells was not able to handle her duties as a bookkeeper. I offered Ms. Wells the transfer to the Tualatin office because that job (patient coordinator/receptionist) was the least stressful position available with Clackamas Gastroenterology Associates, P.C.

11. I did not hire any additional staff for the bookkeeper position because the increased cost of an additional person was not a viable option, given the nature of the duties performed by the bookkeeper.

12. I was responsible for hiring Bernice Thomas as our bookkeeper, on May 19, 1997. I am responsible for supervising Ms. Thomas, and am familiar with her duties and functions. I am aware that Ms. Thomas is able to perform all of the duties and functions listed on the Job Description: Bookkeeper and Patient Collections. Ms. Thomas is actually performing more duties than those listed on the Job Description. On occasion, I have

assigned Ms. Thomas to cover the patient coordinator/receptionist position at our Milwaukee satellite office.

13. On May 6, 1997, I sent a letter to Ms. Wells regarding her return to work at Clackamas Gastroenterology Associates, P.C. At the time, I misunderstood her medical release, and believed that Ms. Wells was authorized to return to work on May 12, 1997, when in fact, she was actually authorized to return on May 13, 1997. I never received any response, either written or oral, from Ms. Wells to my May 6, 1997 letter. When Ms. Wells did not contact me, or show up for work on May 12 through May 15, 1997, I understood her to have voluntarily resigned, in accordance with our unexcused absence policy.

14. I have reviewed the letter from Dr. Adamcak, dated April 28, 1997, and marked as Dupell Deposition Exhibit 115. I received this letter on May 15 or May 16, 1997. I did not see this letter at any time prior to May 15, 1997.

15. Ms. Wells was not terminated because of her disability. I am familiar with Clackamas Gastroenterology Associates, P.C's personnel policy, marked as exhibit 10 for the Wells Deposition. In accordance with that personnel policy, Ms. Wells was considered to have voluntarily terminated by abandoning her job.

16. I make this Affidavit of my own knowledge and in support of Defendant Clackamas Gastroenterogy Associates, P.C.'s Motion for Summary Judgment.

DATED this 28th day of October, 1999.

Analysis of ADA definit actual paid days
For CY 1996 and 1997
#REF!
105 Weeks Summary of and Analysis Methods
No. of Days Paid

		1	2	3	4	5	6	7	8	9	10	11	12	13	14
W1	96	2	0	5	5	5	5	0	5	0	5	0	5	0	0
W2	96	1	0	5	5	5	5	1	5	0	5	0	4	0	2
W3	96	3	0	5	5	5	5	0	5	0	5	0	3	0	2
W4	96	0	0	5	5	5	5	2	5	0	5	0	4	0	2
W5	96	2	0	5	5	5	5	1	5	0	5	0	4	0	2
W6	96	4	0	4	5	5	5	1	5	0	5	0	3	0	2
W7	96	3	0	5	5	5	5	1	5	0	5	0	4	0	1
W8	96	2	0	4	3	4	5	0	5	0	5	0	4	0	2
W9	96	2	1	4	0	5	5	2	5	0	5	0	3	0	1
W10	96	1	5	5	0	5	5	0	5	0	5	0	4	0	0
W11	96	3	5	5	0	5	5	0	5	0	5	0	4	0	0
W12	96	2	5	4	0	5	5	0	5	0	5	0	4	0	0
W13	96	1	5	5	0	5	5	0	5	0	5	0	4	0	0

Gale Dupell
SUBSCRIBED AND SWORN to before me this 28th day of October, 1999.

Notary Public for Oregon

(Certificate or affidavit of service omitted in printing).

Analysis of ADA definit actual paid days
For CY 1996 and 1997
#REF!
105 Weeks Summary of and Analysis Methods
No. of Days Paid

		1	2	3	4	5	6	7	8	9	10	11	12	13	14
W30	96	2	5	5	0	5	5	2	5	0	5	5	4	0	0
W31	96	2	5	5	0	5	5	1	5	0	5	5	1	0	0
W32	96	1	5	5	0	5	5	0	5	0	5	5	4	0	0
W33	96	1	5	5	0	5	5	1	5	0	5	5	4	0	0
W34	96	2	5	5	0	5	5	0	5	0	5	5	3	0	0
W35	96	1	5	5	0	5	5	2	5	0	5	5	1	0	0
W36	96	1	5	5	0	5	5	0	5	0	5	5	5	0	0
W37	96	1	5	5	0	5	5	0	5	0	5	5	4	0	0
W38	96	2	5	5	0	5	5	0	5	0	5	5	4	0	0
W39	96	3	5	5	0	5	5	0	5	0	5	5	4	0	0
W40	96	2	5	5	0	5	5	1	5	0	5	5	4	0	0
W41	96	2	5	5	0	5	5	1	5	0	5	5	4	0	0
W42	96	1	5	5	0	5	5	0	5	0	5	5	5	0	0

W14	96	1	5	5	0	5	5	0	5	0	5	0	4	0	0
W15	96	1	5	5	0	5	5	1	5	0	5	0	4	0	0
W16	96	1	5	5	0	5	5	0	5	0	5	0	4	0	0
W17	96	2	5	5	0	6	5	1	5	0	5	0	4	0	0
W18	96	5	5	5	0	4	5	1	5	0	5	0	4	0	0
W19	96	2	5	5	0	5	5	1	5	0	5	0	4	0	0
W20	96	3	5	5	0	5	5	2	5	0	5	0	5	3	0
W21	96	1	5	5	0	5	5	0	5	0	5	3	2	5	0
W22	96	1	5	5	0	4	5	1	5	0	5	5	5	0	0
W23	96	3	5	5	0	5	5	1	5	0	5	5	4	5	0
W24	96	1	5	5	0	5	5	0	5	0	5	5	4	5	0
W25	96	1	5	5	0	5	5	0	5	0	5	5	5	5	0
W26	96	1	5	5	0	5	5	0	5	0	5	5	5	2	0
W27	96	2	5	5	0	5	5	0	5	0	5	5	5	0	0
W28	96	3	5	5	0	5	5	1	5	0	5	5	5	0	0
W29	96	1	5	5	0	5	5	1	5	0	5	5	4	0	0

Analysis of ADA definit actual paid days
For CY 1996 and 1997
#REF!
105 Weeks Summary of and Analysis Methods
No. of Days Paid

		1	2	3	4	5	6	7	8	9	10	11	12	13	14
W 59	97	3	5	5	0	5	5	0	5	0	5	5	5	0	0
W 60	97	3	5	5	0	4	5	1	5	0	5	5	4	0	0
W 61	97	2	5	5	0	5	5	0	5	0	5	5	3	0	0
W 62	97	4	5	5	0	5	5	0	5	0	5	5	5	0	0
W 63	97	1	5	5	0	5	5	0	4	0	5	5	4	0	0
W 64	97	1	5	5	0	5	5	0	4	2	5	5	5	0	0
W 65	97	0	5	5	0	5	5	0	5	2	5	5	4	0	0
W 66	97	5	5	5	0	5	5	0	5	1	5	5	5	0	0
W 67	97	1	5	5	0	5	5	0	5	1	5	5	4	0	0
W 68	97	1	5	5	0	5	5	0	5	2	5	5	5	0	0
W 69	97	1	5	5	0	4	5	2	5	2	5	5	4	0	0
W 70	97	1	5	5	0	5	5	0	5	1	5	5	4	0	0
W 71	97	3	5	5	0	5	5	0	5	2	5	5	4	0	0

W43	96	1	5	5	0	5	5	1	5	0	5	5	5	0	0
W44	96	1	5	5	0	5	5	1	5	0	5	5	4	0	0
W45	96	1	5	5	0	5	5	1	5	0	5	5	4	0	0
W46	96	2	5	5	0	4	5	0	5	0	5	5	4	0	0
W47	96	1	5	5	0	5	5	0	5	0	5	5	3	0	0
W48	96	3	5	5	0	5	5	0	5	0	5	5	4	0	0
W49	96	2	5	5	0	5	5	0	5	0	5	5	4	0	0
W50	96	3	5	5	0	5	5	2	5	0	5	5	4	0	0
W51	96	2	5	5	0	5	5	0	5	0	5	5	5	0	0
W52	96	4	5	5	0	5	5	0	5	0	4	5	4	0	0
W53	96&97	2	5	5	0	5	5	0	5	0	5	5	5	0	0
W54	97	4	5	5	0	5	5	1	5	0	5	5	4	0	0
W55	97	2	5	5	0	5	5	0	5	0	5	5	4	0	0
W56	97	1	5	5	0	5	5	1	5	0	5	5	4	0	0
W57	97	1	5	5	0	4	5	1	5	0	5	5	5	0	0
W58	97	1	5	5	0	5	5	0	5	0	5	5	4	0	0

Analysis of ADA definit actual paid days
For CY 1996 and 1997
#REF!
105 Weeks Summary of and Analysis Methods
No. of Days Paid

		1	2	3	4	5	6	7	8	9	10	11	12	13	14
W 88	97	1	5	5	0	5	5	0	5	0	5	0	5	0	0
W 89	97	2	5	4	0	5	5	0	5	2	5	0	3	0	0
W 90	97	2	5	5	0	4	5	0	5	1	5	0	3	0	0
W 91	97	1	5	5	0	4	5	1	5	1	5	0	4	0	0
W 92	97	1	5	0	0	5	5	0	5	0	5	0	4	0	0
W 93	97	1	5	0	0	5	5	0	5	1	5	0	2	0	0
W 94	97	2	5	5	0	5	5	0	5	2	5	0	5	0	0
W 95	97	2	5	5	0	5	5	0	5	2	5	0	5	0	0
W 96	97	2	5	5	0	5	5	0	5	2	5	0	4	0	0
W 97	97	1	5	5	0	5	5	0	5	3	5	0	4	0	0
W 98	97	2	5	5	0	5	5	2	5	2	5	0	4	0	0
W 99	97	1	5	5	0	5	5	0	5	1	5	0	4	0	0
W 100	97	3	5	5	0	5	5	0	5	0	5	0	4	0	0

W 72	97	5	5	5	0	5	5	0	5	2	5	5	4	0	0
W 73	97	1	5	5	0	5	5	0	5	2	5	5	4	0	0
W 74	97	2	5	5	0	5	5	0	5	0	5	5	5	0	0
W 75	97	1	5	5	0	4	5	0	5	0	5	5	4	0	0
W 76	97	0	5	5	0	5	5	0	5	0	5	5	5	0	0
W 77	97	0	5	5	0	5	5	0	5	2	5	5	4	0	0
W 78	97	1	5	5	0	5	5	0	5	0	5	5	4	0	0
W 79	97	2	5	5	0	5	5	0	5	2	5	5	3	0	0
W 80	97	1	5	5	0	5	5	0	5	1	5	1	3	0	0
W 81	97	2	5	5	0	5	5	0	5	2	4	0	5	0	0
W 82	97	1	5	5	0	5	5	0	5	1	5	0	4	0	0
W 83	97	1	5	5	0	5	5	0	5	1	5	0	4	0	0
W 84	97	3	5	5	0	5	5	2	5	0	5	0	4	0	0
W 85	97	1	5	5	0	5	5	0	5	1	5	0	5	0	0
W 86	97	2	5	5	0	3	5	0	5	3	5	0	3	0	0
W 87	97	1	5	5	0	5	5	0	5	2	5	0	3	0	0

Analysis of ADA definit actual paid days
For CY 1996 and 1997
#REF!
105 Weeks Summary of and Analysis Methods
No. of Days Paid

		15	16	17	18	19	20	21	22	23	24				TOTALS
W1	96	0	0	5	5	5	0	5	0	0	5				62
W2	96	0	0	5	5	5	0	5	0	0	5				63
W3	96	0	0	5	5	5	0	5	0	0	5				63
W4	96	0	0	5	5	5	0	5	0	0	5				63
W5	96	0	0	5	5	5	0	3	0	0	5				62
W6	96	0	0	5	5	5	0	1	0	0	5				60
W7	96	0	0	5	5	5	0	1	0	0	5				60
W8	96	0	0	5	5	5	0	1	0	0	5				13
W9	96	0	0	5	5	5	0	2	0	0	5				55
W10	96	0	0	5	5	5	0	5	0	0	5				60
W11	96	0	0	5	5	5	0	5	0	0	5				61
W12	96	0	0	5	5	5	0	5	0	0	5				60
W13	96	0	0	5	4	5	0	5	0	0	5				59

W 101	97	0	5	5	0	4	5	1	5	2	5	0	5	0	0
W 102	97	0	5	5	0	5	5	0	5	2	5	0	4	0	0
W 103	97	0	5	5	0	4	5	0	5	2	5	0	5	0	0
W 104	97	0	5	5	0	5	5	0	5	3	5	0	4	0	0
W 105	97	0	3	3	0	3	3	0	3	1	3	0	2	0	0

Analysis of ADA definit actual paid days
For CY 1996 and 1997
#REF!
105 Weeks Summary of and Analysis Methods
No. of Days Paid

		15	16	17	18	19	20	21	22	23	24				TOTALS
W30	96	0	0	0	5	5	0	5	0	0	5				63
W31	96	0	0	0	5	5	0	5	0	0	5				59
W32	96	0	0	0	5	5	0	5	0	0	5				60
W33	96	0	0	0	5	5	0	5	0	0	5				61
W34	96	0	0	0	5	5	0	5	0	0	5				60
W35	96	0	0	0	5	5	0	5	0	0	5				59
W36	96	0	0	0	5	5	0	5	0	0	5				61
W37	96	0	0	0	5	5	0	5	0	0	5				60
W38	96	0	0	0	5	5	0	5	0	0	5				61
W39	96	0	0	0	5	5	0	5	0	0	5				62
W40	96	0	0	0	5	5	0	5	0	0	5				62
W41	96	0	0	0	5	5	0	5	0	0	5				62
W42	96	0	0	0	5	5	0	5	0	0	5				61

W14	96	0	0	5	5	5	0	5	0	0	5				60
W15	96	0	0	5	5	5	0	5	0	0	5				61
W16	96	0	0	5	5	5	0	5	0	0	5				60
W17	96	0	0	4	5	5	0	5	0	0	5				62
W18	96	0	0	5	5	5	0	5	0	0	5				64
W19	96	0	0	5	5	5	0	5	0	0	5				62
W20	96	0	0	5	5	5	0	5	0	0	5				68
W21	96	0	0	5	5	5	0	5	0	0	5				66
W22	96	0	0	5	5	5	0	5	0	0	5				68
W23	96	0	0	0	5	5	0	5	0	0	5				68
W24	96	0	0	0	5	5	0	5	0	0	5				65
W25	96	0	0	0	5	5	0	5	0	0	5				66
W26	96	0	0	0	5	5	0	5	0	0	5				63
W27	96	0	0	0	5	5	0	5	0	0	5				62
W28	96	0	0	0	5	5	0	5	0	0	5				64
W29	96	0	0	0	5	5	0	5	0	0	5				61

Analysis of ADA definit actual paid days
For CY 1996 and 1997
#REF!
105 Weeks Summary of and Analysis Methods
No. of Days Paid

		15	16	17	18	19	20	21	22	23	24				TOTALS
W 59	97	0	0	0	5	5	5	5	0	0	5				68
W 60	97	0	0	0	5	5	5	5	0	0	5				67
W 61	97	0	0	0	5	5	5	5	0	0	5				65
W 62	97	0	0	0	5	5	5	5	0	0	5				69
W 63	97	0	0	0	5	5	5	5	0	0	5				64
W 64	97	0	0	0	5	5	5	5	0	0	5				67
W 65	97	0	0	0	5	5	5	5	0	0	5				66
W 66	97	0	0	0	5	5	1	5	0	0	5				67
W 67	97	0	0	0	5	5	0	5	0	0	5				61
W 68	97	0	0	0	5	5	0	5	0	0	5				63
W 69	97	0	0	0	5	5	0	5	0	0	5				63
W 70	97	0	0	0	5	5	0	5	0	0	3				59
W 71	97	0	0	0	5	5	0	5	0	0	0				59

51

W43	96	0	0	0	5	4	0	5	0	0	5				61
W44	96	0	0	0	5	5	0	5	0	0	5				61
W45	96	0	0	0	5	5	0	5	0	0	5				61
W46	96	0	0	0	5	5	0	5	0	0	5				60
W47	96	0	0	0	5	5	0	5	0	0	5				59
W48	96	0	0	0	5	5	0	5	0	0	5				62
W49	96	0	0	0	5	5	0	5	0	0	5				61
W50	96	0	0	0	5	5	0	5	0	0	5				64
W51	96	0	0	0	5	0	0	5	0	0	5				57
W52	96	0	0	0	5	0	0	5	0	0	5				57
W53	96&97	0	0	0	5	0	2	5	0	0	5				59
W54	97	0	0	0	5	5	5	5	0	0	5				69
W55	97	0	0	0	5	5	5	5	0	0	5				66
W56	97	0	0	0	5	5	5	5	0	0	5				66
W57	97	0	0	0	5	5	5	5	0	0	5				66
W58	97	0	0	0	5	5	5	5	0	0	5				65

50

Analysis of ADA definit actual paid days
For CY 1996 and 1997
#REF!
105 Weeks Summary of and Analysis Methods
No. of Days Paid

		15	16	17	18	19	20	21	22	23	24				TOTALS
W 88	97	5	0	0	5	5	0	5	5	0	0				61
W 89	97	5	0	0	5	5	0	5	5	0	0				61
W 90	97	4	0	0	5	5	0	5	5	0	0				59
W 91	97	5	0	0	5	5	0	5	5	0	0				61
W 92	97	5	0	0	5	5	0	5	5	0	0				55
W 93	97	5	0	0	5	5	0	5	5	0	0				54
W 94	97	5	0	0	5	5	0	5	5	0	0				64
W 95	97	5	0	0	5	5	0	5	5	0	0				64
W 96	97	5	0	0	5	5	0	5	5	0	0				63
W 97	97	5	0	0	5	5	0	5	5	0	0				63
W 98	97	0	0	0	5	5	0	5	5	2	0				60
W 99	97	0	0	0	5	5	0	5	5	5	0				61
W 100	97	0	0	0	5	5	0	5	5	5	0				62

W 72	97	0	0	0	5	5	0	5	0	0	0				61
W 73	97	0	0	0	5	5	0	5	5	0	0				62
W 74	97	0	0	0	5	5	0	5	5	0	0				62
W 75	97	0	0	0	5	5	0	5	5	0	0				60
W 76	97	0	0	0	5	5	0	5	5	0	0				60
W 77	97	0	0	0	5	5	0	5	5	0	0				61
W 78	97	0	0	0	5	5	0	5	5	0	0				60
W 79	97	0	0	0	5	5	0	5	5	0	0				58
W 80	97	0	0	0	5	5	0	5	5	0	0				55
W 81	97	0	0	0	5	5	0	5	5	0	0				59
W 82	97	0	0	0	5	5	0	5	5	0	0				56
W 83	97	0	0	0	5	5	0	5	2	0	0				53
W 84	97	0	0	0	5	5	0	5	5	0	0				59
W 85	97	5	0	0	5	5	0	5	5	0	0				62
W 86	97	5	0	0	5	5	0	5	5	0	0				61
W 87	97	5	0	0	5	5	0	5	5	0	0				61

Analysis of ADA definit actual paid days
For CY 1996 and 1997
#REF!
105 Weeks Summary of and Analysis Methods
No. of Days Paid

				Majority Pd in wk include											
				Freeman											
W1	96			13											
W2	96			15											
W3	96			14											
W4	96			14											
W5	96			15											
W6	96			15											
W7	96			15											
W8	96			13											
W9	96			15											
W10	96			13											

W 101	97	0	5	0	5	5	0	5	5	5	0				67
W 102	97	0	5	0	5	5	0	5	5	5	0				66
W 103	97	0	5	0	5	5	0	5	5	5	0				66
W 104	97	0	5	0	5	5	0	5	5	5	0				67
W 105	97	0	3	0	3	3	0	3	3	3	0				39

Note: 1=Klecan, 2=Andrews, 3=Baker, 4=DeFrancesco, 5=Dickson, 6=Dupell, 7=Freeman, 8=Gilliland 9=Gilman, 10=Harvey, 11=Haskins, 12=Heusch, 13=, 14= Korshoj, 15=Lang, 16=Libbey, 17= Lorenz, 18= Pimental, 19=Poot, 20=Smith, 21=Steven-son, 22=Thomas, 23=Williams, 24=Wells.

Analysis of ADA definit actual paid days
For CY 1996 and 1997
#REF!
105 Weeks Summary of and Analysis Methods
No. of Days Paid

				Majority pd in wk include											
				Freeman											
W30	96			13											
W31	96			14											
W32	96			13											
W33	96			14											
W34	96			13											
W35	96			14											
W36	96			13											
W37	96			13											
W38	96			13											
W39	96			13											
W40	96			14											

W11	96			13											
W12	96			13											
W13	96			13											
W14	96			13											
W15	96			15											
W16	96			13											
W17	96			14											
W18	96			14											
W19	96			14											
W20	96			15											
W21	96			15											
W22	96			15											
W23	96			15											
W24	96			14											
W25	96			14											
W26	96			14											
W27	96			13											
W28	96			14											
W29	96			13											

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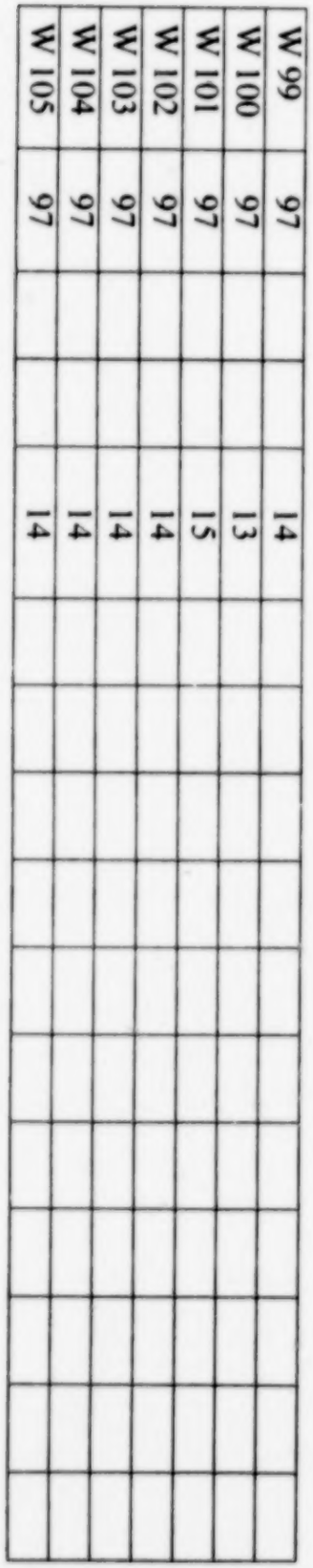
				Majority pd in wk include											
				Freeman											
W 59	97			14											
W 60	97			15											
W 61	97			14											
W 62	97			14											
W 63	97			14											
W 64	97			15											
W 65	97			14											
W 66	97			15											
W 67	97			14											
W 68	97			14											
W 69	97			15											

W41	96			14											
W42	96			13											
W43	96			14											
W44	96			14											
W45	96			14											
W46	96			13											
W47	96			13											
W48	96			13											
W49	96			13											
W50	96			14											
W51	96			12											
W52	96			12											
W53	96&97			13											
W54	97			15											
W55	97			14											
W56	97			15											
W57	97			15											
W58	97			14											

Analysis of ADA definit actual paid days
For CY 1996 and 1997
#REF!
105 Weeks Summary of and Analysis Methods
No. of Days Paid

				Majority pd in wk include											
				Freeman											
W 88	97			13											
W 89	97			14											
W 90	97			14											
W 91	97			15											
W 92	97			12											
W 93	97			13											
W 94	97			14											
W 95	97			14											
W 96	97			14											
W 97	97			14											
W 98	97			14											

W 70	97			14											
W 71	97			14											
W 72	97			13											
W 73	97			14											
W 74	97			13											
W 75	97			13											
W 76	97			12											
W 77	97			13											
W 78	97			13											
W 79	97			14											
W 80	97			13											
W 81	97			13											
W 82	97			13											
W 83	97			13											
W 84	97			13											
W 85	97			14											
W 86	97			14											
W 87	97			14											



NO: 99-406-AS
UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

DEBORAH ANNE WELLS
Plaintiff,

V

CLACKAMAS GASTROENTEROLOGY ASSOCIATES,
P.C. an Oregon corporation,
Defendant.

AFFIDAVIT OF CRAIG A. CRISPIN IN SUPPORT OF PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I, Craig A. Crispin, being first duly sworn, depose and say:

1. I am the one of the attorneys representing plaintiff Deborah Anne Wells in the above entitled matter, and I make this Affidavit upon personal knowledge and in support of Plaintiff's Response to Defendant's Motion for Summary Judgment.

2. Attached as Exhibit 1 are true and correct copies of excerpts from the deposition of Deborah Anne Wells taken on August 12, 1999.

3. Attached as Exhibit 2 are true and correct copies of excerpts and deposition exhibits from the deposition of Gale Dupell taken on October 5, 1999.

4. Attached as Exhibit 3 are true and correct copies of excerpts from the deposition of Steven Jon Mason, MD taken on October 5, 1999.

5. Attached as Exhibit 4 are true and correct copies of excerpts from the deposition of Robert Wollmuth, MD taken on October 5, 1999.

Craig A. Crispin

SUBSCRIBED AND SWORN to this 29th day of November before the undersigned notary public.

Notary Public for Oregon

Exhibit 2

[7] Q. Is there anything about you today, such as fatigue, medication, like that that would make it so that you don't have your normal ability to recall and testify?

A. No, there's nothing.

Q. Where are you employed?

A. Clackamas Gastroenterology – Both places. Clackamas Gastroenterology Associates, P C.

Q. That's the – Okay. Is it your understanding that the formal title of your employer is Clackamas Gastroenterology, P C?

A. Associates, P C.

Q. Associates, P C. That suggests to me it's a professional corporation.

A. Correct.

Q. You heard testimony it was a partnership a few minutes ago.

A. I think the physicians think of themselves as partners in organizations.

Q. So the entity actually is a professional corporation, and the five doctors are shareholders in that corporation?

A. Correct.

* * *

[3]Q. Do you know whether or not it ever was a partnership?

Q. Can you give me a summary of your duties?

A. Basically, I'm responsible for all non medical aspects of the practice.

Q. Does that include management of personnel?

A. Management of personnel, all operations, basically anything that doesn't require direct patient care. It does include supervising the nurses at the surgery center, but not determining their medical skills.

Q. It does not include management of the physician employees?

A. It does, actually, have a role in that, making sure that the physicians are in compliance with the standards we've established. They do officially report to me as employees.

Q. And Dr. Wollmuth is correct that the five physicians are in fact employees of the corporation?

A. That's correct.

Q. As of right now, how many other employees are employed by Clackamas GI? What's your total head count?

A. Somewhere close to 20, but I'm not sure exactly. We have a lot of part-time people, and - - I mean I can look it up.

Q. The number 20, is that an FTE or is that number of bodies?

* * *

[37]A. No. I mean I see dates here, but I don't

personally know.

Q. You do know that you received it prior to May 12th?

A. Yes.

Q. So you knew that Ms. Wells was authorized by her attending physician to be off work through May 12, 1997?

A. Correct. Although I had originally misread it as to May 12.

Q. It in fact does say through May 12, doesn't it?

A. I see that.

Q. Going back to Exhibit 114, your May 6, 1997 letter, did you draft this letter on May 6th?

A. The letter would be dated whatever date I was mailing it. If I had done a draft a prior day, I would have revised the date to the date it was mailed, so I don't know. It could have all been done in one day.

Q. The second page of Exhibit 114, was that enclosed with your letter dated May 6?

A. Yes, the Cobra form.

Q. And you put on the third line employment termination date May 12, 1997.

A. Uh-huh (affirmative response).

[38]Q. Is that your handwriting?

A. Yes, it is.

Q. Did you understand or – Let's put it this way, did you have an expectation as of May 6, 1997 that Ms. Wells would be terminated on May 12, 1997?

A. Yes.

Q. Can you tell me what entered into your expectation?

A. Because she had filed for disability insurance, that it didn't take place until after two weeks of leave, that, to me, was her way of notifying us that she wouldn't be returning.

Q. At any point in time did Ms. Wells orally tell you that she did not intend to return?

A. No. Despite our policy being to call in, she had not called in at all.

Q. At any point in time did Ms. Wells inform you in writing that she would not be returning to work?

A. No.

Q. Didn't you interpret the medical release that you have there, Exhibit 112, the April 28, 1997 release, as indication that she would not be at work from April 25th through May 12th?

A. I had misread it as to.

Q. I understand.

Exhibit 114 to Depositin of Gale Dupell

Mr. Debbie Wells
16601 S. Archer Drive
Oregon City, OR 97045
May 6, 1997

Dear Debbie,

This letter includes the information that you want for your disability insurance claim form. Since you have requested this information, are you planning on returning to work May 12th as your medical release states? Due to the hardship your absence is placing on the company, we will have to terminate your employment if you do not return full-time next Monday.

If you do not return on the 12th, then you would owe $517.72 for the difference between the paid estimated hours and actual/accrued hours. In addition, you have not sent in the $219.20 you received in error with your April 30 direct deposit paycheck. Since you may be unable to work due to an on-going medical condition, we will wave repayment of these amounts; it you do not return.

On May 12th, if you do not arrive, we will be notifying the various insurance plans that you no longer work here. The COBRA form is enclosed which you will use to either elect to continue your medical coverage or not to continue it. Send the completed from directly to John Alden Life Insurance Co. at the address on the form. If you wish to continue coverage past May 31, 1997, send a check to us for $226.61 by the 20th of each month starting in May.

The following information covers the relevant questions

on the Unum Disability Claim form. Your are a full-time employee working Monday through Friday from 8:00 am until 5:00 pm. Your job title is Patient Coordinator. The last day you came to work was April 24th. Your doctor has provided a Report of Disability related to your on-going medical problems. Your current gross wage is $ 1 3.70 per hour with your last increase being a COL one effective January 1, 1 997. You are a participant in our Pension and Profit Sharing Plans. You have been paying for the short tem disability plan on an after tax basis.

Sincerely,

Gale R. Dupell, M.B.A.
Administrator

Exhibit 4

practice our subspecialty of gastroenterology in the south Portland area.

Q. Who are the five partners?

A. Myself, Dr. John Mason, Dr. Mike Sheffield, Dr. Will Ferrin, and Dr. Mark Sheffield.

Q. Now, are the four partners – Is it a partnership you say?

A. Five partners.

Q. Are the partners employees of the partnership?

A. Yes.

Q. Under employment agreements of some kind?

A. Yes.

Q. How many offices or clinics does the partnership operate?

A. We have two full-time offices and two part-time offices.

Q. You refer to them as offices rather than clinics or hospitals or -

A. Clinics, yeah.

Q. Two full time and two part time?

A. Yes.

Q. Can you describe for me what it means to have a part-time clinic?

A. We rent space for several part days a week or one part day a week, and otherwise we're not there and

Ms. Debbie Wells
16601 S. Archer Drive
Oregon City, OR 97045
May 6, 1997

Dear Debbie,

This letter includes the information that you want for your disability insurance claim form. Since you have requested this information, are you planning on returning to work May 12th as your medical release states? Due to the hardship your absence is placing on the company, we will have to terminate your employment if you do not return full-time next Monday.

If you do not return on the 12th, then you would owe $517.72 for the difference between the paid estimated hours and actual/accrued hours. In addition, you have not sent in the $219.20 you received in error with your April 30 direct deposit paycheck. Since you may be unable to work due to an on-going medical condition, we will wave repayment of these amounts; if you do not return.

On May 12th, if you do not arrive, we will be notifying the various insurance plans that you no longer work here. The COBRA form is enclosed which you will use to either elect to continue your medical coverage or not to continue it. Send the completed from directly to John Alden Life Insurance Co. at the address on the form. If you wish to continue coverage past May 31, 1997, send a check to us for $226.61 by the 20th of each month starting in May.

The following information covers the relevant questions on the Unum Disability Claim form. Your are a full-time

employee working Monday through Friday from 8:00 am until 5:00 pm. Your job title is Patient Coordinator. The last day you came to work was April 24th. Your doctor has provided a Report of Disability related to your on-going medical problems. Your current gross wage is $13.70 per hour with your last increase being a COL one effective January 1, 1997. You are a participant in our Pension and Profit Sharing Plans. You have been paying for the short tem disability plan on an after tax basis.

Sincerely,
Gale R. Dupell, M.B.A.
Administrator

(Certificate or affidavit of service omitted in printing).

NO: 99-406-AS
UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

DEBORAH ANNE WELLS
Plaintiff,

V

CLACKAMAS GASTROENTEROLOGY ASSOCIATES,
P.C. an Oregon corporation,
Defendant.

PLAINTIFF'S RESPONSE TO DEFENDANT'S CONCISE STATEMENT OF MATERIAL FACTS

Plaintiff responds to defendant's Concise Statement of Material Facts as follows:

1. For purposes of this response to defendant's Motion for Summary Judgment, plaintiff does not dispute defendant's paragraph 1.

2. Plaintiff disputes defendant's paragraph 2. When defendant's shareholder employees are included, defendant consistently employs from 18 to 19 employees. Gale Dupell Dep. Tr. 13; Robert Wollmuth M.D. Dep. Tr. 7

3. For purposes of this response to defendant's Motion for Summary Judgment, plaintiff does not dispute defendant's paragraph 3.

4. For purposes of this response to defendant's Motion for Summary Judgment, plaintiff does not dispute defendant's paragraph 4.

5. Plaintiff disputes that portion of defendant's paragraph 5 which claims certain enumerated duties were essential duties of the position. Dupell Dep. Tr. 58, 63-64, 65. For purposes of this response to defendant's Motion for Summary Judgment, plaintiff does not dispute that the certain enumerated duties were performed by plaintiff.

6. Plaintiff disputes defendant's paragraph 6. Plaintiff had no input into the creation of the job description. Wells Dep. Tr. 108.

7. Plaintiff disputes defendant's paragraph 7. Wells Dep. Tr. 15-16, 22-24, 28. Plaintiff also objects to defendant's paragraph 7 because it is misleading and factually unfounded. The citation upon which defendant relies does not support the contention contained within this paragraph, and it is otherwise disputed by plaintiff. Wells Dep. Tr. 36-38.

8. For purposes oft his response to defendant's Motion for Summary Judgment, plaintiff does not dispute defendant's paragraph 8, but alleges it is not relevant to any issue in the case and inadequate to establish any relevant or material fact.

9. Plaintiff disputes defendant's paragraph 9. See ¶ 26 infra. Plaintiff also objects to defendant's paragraph 9 because it is misleading and factually unfounded. The citation upon which defendant relies does not support the contention contained within this paragraph, and it is otherwise disputed by plaintiff.

10. Plaintiff objects to defendant's paragraph 10 because it is a legal conclusion. Plaintiff also disputes defendant's paragraph 10. Dupell Dep. Tr. 65-66. Plaintiff alleges also that defendant's reference to "hiring an additional person" is not consistent with plaintiffs request for accommodation and is therefore irrelevant.

11. Plaintiff disputes defendant's paragraph 11, and alleges that on April 24, 1997 defendant ordered plaintiff to its Tualatin office, with the knowledge and expectation that plaintiff would be unable to perform the work at such location and with the purpose of forcing plaintiff to quit. See ¶¶ 28, 29 infra. Plaintiff also objects to defendant's paragraph 11 on the ground that the contention is misleading and unsupported by the citations provided by defendant.

12. Plaintiff denies defendant's paragraph 12. See ¶ 28 infra. To the extent defendant acted on the belief such position was less stressful, it had no medical support for its decision. Dupell Dep. Tr. 51.

13. Responding to defendant's paragraph 13, plaintiff agrees that she declined the transfer to defendant's Tualatin office, in part because it was humiliating and in part because she was physically unable to make the drive to the Tualatin office. Wells Dep. Tr. 46, 48-49, 85-86.

14. For purposes of this response to defendant's Motion for Summary Judgment, plaintiff does not dispute defendant's paragraph 14, but alleges that whether or not plaintiff "offered to return to work" is not relevant to any issue in the case and inadequate to establish any relevant or material fact.

15. For purposes of this response to defendant's

Motion for Summary Judgment, plaintiff does not dispute defendant's paragraph 1 5, but alleges it is not relevant to any issue in the case and inadequate to establish any relevant or material fact.

16. For purposes of this response to defendant's Motion for Summary Judgment, plaintiff does not dispute defendant's paragraph 16.

17. Plaintiff disputes defendant's paragraph 17. Defendant received by fax a copy of a medical release from plaintiff's physician. Wells Dep. Tr. 79-80.

18. For purposes of this response to defendant's Motion for Summary Judgment, plaintiff does not dispute defendant's paragraph 18, but alleges it is not relevant and is inadequate to establish any relevant or material fact.

19. For purposes of this response to defendant's Motion for Summary Judgment, plaintiff does not dispute defendant's paragraph 19, but alleges that she did not return to work on such dates due to her protected medical leave and the discriminatory acts of defendant. Wells Dep. Tr. 66-67, 79-80.

20. For purposes of this response to defendant's Motion for Summary Judgment, plaintiff does not dispute defendant's paragraph 20, but alleges that plaintiff could have continued in her position with defendant had it provided reasonable accommodation. Wells Dep. Tr. 66-67; 79-80.

21. For purposes of this response to defendant' s Motion for Summary Judgment, plaintiff agrees that she submitted a letter to Unum Insurance Company dated August 13, 1997 in which she stated that she was unable,

at that time, to work. Plaintiff disputes any inference otherwise intended by defendant' s paragraph 2 1. See ¶ 22 infra.

22. For purposes of this response to defendant's Motion for Summary Judgment, plaintiff agrees that her attending physician wrote a letter stating that — at that time — plaintiff was unable to work. Plaintiff denies that any inference can be drawn that plaintiff was unable to work at the time of the discriminatory acts alleged in this action or at any later time. Wells Dep. Tr. 91-92.

Plaintiff alleges the following facts:

23. Defendant left to plaintiff the priorities to be given to plaintiff's various duties, with instructions to attend to matters with deadlines first, Collections work had no deadlines. Wells Dep. Tr. 15-16.

24. Collections were affected by installation of a new computer system, which caused a delay in billing of approximately 9 months. Wells Dep. Tr. 16-17.

25. Defendant instructed plaintiff to work on collections as a higher priority in October 1996. By December, defendant informed plaintiff she was doing a good job on collections. Wells Dep. Tr. 20, 28.

26. Plaintiff requested reasonable accommodation for the effects of her disability numerous times. These requests included requests for assistance from another of defendant's employees in the performance of plaintiff's growing work load, requests that defendant stop assigning plaintiff to relief receptionist duties, and an adjustment in working hours. Wells Dep. Tr. 22-23, 23-24, 35-36, 37-38, 38-39, 41-42, 43, 58-59, 62, 65.

27. Defendant provided extra assistance to other employees, but refused to provide assistance to plaintiff. Wells Dep. Tr. 5 1 . Defendant adjusted plaintiff's work hours, but refused to continue such adjustment after April 25, 1997. Wells Dep. Tr. 53-54. Defendant continued to assign plaintiff to relief receptionist duties. Wells Dep. Tr. 4 1-45 . Defendant responded to plaintiff's requests for accommodation by demoting her to a receptionist position at its Tualatin office. Wells Dep. Tr. 43-45, 47-49.

28. On April 24, 1997, defendant informed plaintiff that she would be henceforth assigned to defendant's Tualatin office. Wells Dep. Tr. 43-45. Defendant had knowledge that plaintiff's disability prevented her from working at the Tualatin office due to the required late-afternoon work and stressful commute. Wells Dep. Tr. 36, 48-49, 53-54.

29. When plaintiff protested the assignment to Tualatin due to her inability to work without defendant's accommodations for her disability, defendant's Gale Dupell indicated her desire that plaintiff quit her employment. Wells Dep. Tr. 53, 57, 58-59, 65.

30. Plaintiff suffered disabling symptoms as a result of defendant's discriminatory effort to transfer her to Tualatin, and scheduled a medical appointment for April 28, 1997, pending which she did not report to work. Defendant was notified of plaintiff's medical status. Wells Dep. Tr. 71, 73; Dupell Dep. Tr. 35.

31. Plaintiff's physician released plaintiff from work through May 12, 1997 by notice to the employer. Wells Dep. Ex. 11; Dupell Dep. Tr. 35, Ex. 112.

32. Defendant expected to terminate plaintiff on May

12, 1997 as early as May 6, 1997. Wollmuth Dep. Tr. 20. Defendant communicated to plaintiff by letter dated May 6, 1997 that she would be terminated if she did not return to work by May 12, 1997, and further provided COBRA forms to plaintiff containing a termination date of May 12, 1997. Dupell Dep. Tr. 37- 38, Ex.114. Defendant acknowledges that plaintiff's authorized medical release extended to May 13, 1997. Dupell Dep. Tr. 37.

33. On May 12, 1997, plaintiff faxed to defendant a new medical release taking her off work from May 12, 1997 through June 16, 1997. Defendant received the extended release from work on May 12, 1997. Wells Dep. Tr. 79-80; Dupell Dep. Tr. 41, Ex. 113 p.2.

34. Defendant's policies provided 40 hours of sick leave per year. Those policies did not place a maximum on vacation accrued per year, and plaintiff was entitled to approximately 20 days of vacation time in 1997. Dupell Dep. Ex. 101 p.5; Wollmuth Dep. Tr. 43. Defendant covered for other absences by hiring temporary employees. Dupell Dep. Tr. 65-66. Defendant also did not fill plaintiff's position for several weeks after it claims it terminated her. Dupell Dep. Tr. 65-66.

35. By no later than May 16, 1997, defendant had received a medical report dated April 28, 1997 from plaintiffs physician describing plaintiffs temporary disability and symptoms. Dupell Dep. Tr. 47, ex. 115. As of May 16, 1997, defendant had not taken any action or completed any forms terminating plaintiffs employment. Dupell Dep. Tr. 46-47.

36. Defendant claims to have made the decision that plaintiff was no longer employed as early as May 12, 1997. Wollmuth Dep. Tr. 44-45; Steven Mason, M.D. Dep.

Tr. 15.

37. Plaintiff could have continued to work in her position with defendant had defendant provided reasonable accommodation and had defendant not exacerbated her physical condition by its discriminatory acts. Wells Dep. Tr. 106-07. Plaintiff was released to work the end of August 1997. Wells Dep. Tr. 92. She began work for Bend Memorial Clinic, doing bookkeeping and payroll, in October 1998 and continues in employment with that clinic. Wells Dep. Tr. 101.

CRISPIN & ASSOCIATES

By:_____
Craig A. Crispin, OSB No. 82485
Of Attorneys for Plaintiff

(Certificate or affidavit of service omitted in printing).

Civil No. 99-406-AS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DEBORAN ANNE WELLS,
Plaintiff,

v.

CLACKAMAS GASTROENTEROLOGY ASSOCIATES PC,
an Oregon corporation,
Defendants.

Filed March 22, 2000

FINDINGS AND RECOMMENDATION

ASHMANSKAS, Magistrate Judge:

Plaintiff Deborah Wells brings this action against defendant Clackamas Gastroenterology Associates, P.C., her former employer. Plaintiff brings claims under the Americans With Disabilities Act (ADA), 42 U.S.C. § 12101 seq. and O.R.S. § 659.436, alleging that defendant unlawfully discriminated against her by refusing to reasonably accommodate her alleged disability and by terminating her employment. She also brings a claim for wrongful discharge. Presently before the court is defendant's motion for summary judgment.

STANDARDS

Summary judgment is only appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law Fed. R. Civ. P.

56(c). The moving party must show the absence of an issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1936). The moving party must support the summary judgment motion with affidavits made on personal knowledge, pleadings, depositions, answers to interrogatories or admissions by party opponents sufficient to set forth all material facts required for summary judgment. Id. If the moving party adequately supports the motion, the adverse party may not rest upon the pleading, but must respond with affidavits made on personal knowledge, pleadings, depositions, answers to interrogatories or admissions by party opponents sufficient to demonstrate a genuine issue for trial. Id. at 322-23.

Reasonable doubts regarding the existence of a genuine issue of material fact arc resolved against the moving party. United States ex. Rel. Anderson v. Northern Telecom, Inc., 52 F.3d 810, 815(9th Cir. 1995). Inferences drawn from facts are viewed in the light most favorable to the non-moving party. Id.

A scintilla of evidence, or evidence that is merely colorable or not significantly probative, does not present a genuine issue of material fact. United Steelworkers of America v. Phelps Dodge Corp., 865 F.2d 1539, 1542 (9th Cir. 1989), cert. denied, 493 U.S. 809 (1989). No genuine issue for trial exists where the record as a whole could not lead the trier of fact to find for the non-moving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

The substantive law governing a claim determines whether a fact is material. Anderson v, Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Only disputes over facts that are relevant to an element of a claim or defense or whose existence might affect the outcome of the suit

will properly preclude the entry of summary judgment. Id.

DISCUSSION

Defendant moves for summary judgment arguing, among other things, that defendant was not covered by the ADA during the relevant time period.

Under the ADA, it is illegal for a "covered entity" to discriminate against a qualified individual with a disability. 42 U.S.C. § 12112(a). An "employer" is one type of "covered entity." 42 U.S.C. § 12111(2). An "employer" must have 15 or more employees in each of 20 or more calendar weeks in the current or preceding calendar year. 42 U.S.C. § 1211 1(5)(A). An "employee" is defined as "an individual employed by an employer." 42 U.S.C. § 12111(4). Thus, in order for defendant to be covered by the ADA, it must have had 15 or more employees for 20 or more weeks during 1996 or 1997.

During the relevant time period, defendant was a professional corporation with four physician shareholders. It is undisputed that if the physician shareholders are not counted, defendant had 15 employees for only 10 weeks in 1996 and for only 8 weeks in 1997. In such a case, defendant would not be a "covered entity." Thus, the issue before the court is whether the physician shareholders of a professional corporation are "employees" under the ADA.

Plaintiff urges that a different test should be used to determine who is an employee under the ADA, depending upon whether the inquiry is coverage or the right to sue. I disagree. The ADA contains only one definition of "employee," and no indication that a different test should be used for coverage and the right

to sue. Also, if different definitions were used, inconsistent results would be possible an individual who finds himself an "employee" for purposes of coverage, but with no right to sue, or vice versa). My conclusion is buttressed by an unpublished opinion from the Ninth Circuit that used the economic realities test[1] to differentiate between an employee and independent contractor for purposes of coverage under federal employment discrimination laws. Miller v. Lifestyle Creations, Inc., 993 F.2d 883, 1993 WL 173724 (9th Cir. 1993).

It is generally accepted that those who are properly classified as partners are not "employees" for purposes of the antidiscrimination statutes. See, Hishon v. King& Spaulding, 467 U.S. 69, 79 (1984); Burke v. Friedman, 556 F.2d 867, 869 (7th Cir. 1977). It is also generally accepted that corporate employees are employees under antidiscrimination statutes. See, e.g., Archer v. Globe Motorists Supply Co., 833 F. Supp. 211, 213 (S.D.N.Y. 1993). However, the status of a shareholder in a professional corporation remains unsettled because its organizational structure is somewhere between a partnership and a regular corporation.

The Ninth Circuit has not addressed the specific issue of whether the shareholders of a professional corporation are employees for purposes of the antidiscrimination laws. It has, however, looked at the issue of whether under some circumstances a partner can be an employee. In Strother v. Southern California Permanente Medical Group, 79 F.3d 859 (1996), the Ninth Circuit considered whether a physician labeled as a partner can be considered an employee for purposes of bringing suit under federal employment discrimination laws. The court found that, in determining whether a partner can be an "employee,"

the court must

> analyze the true relationship among partners, including the method of compensation, the "partner's" responsibility for partnership liabilities, and the management structure and the "partner's" role in that management, to determine if an individual should be treated as a partner or an employee for the purpose of employment discrimination laws.

79 F.3d at 867.

In Strother, the medical partnership in which plaintiff was a partner had 2400-2500 partners. The affairs of the partnership were conducted predominantly by a board of directors, over which the plaintiff had little control and to which she had limited access. Her compensation was determined by her performance, and she could be disciplined for poor performance. Thus, the court remanded to the district court, finding that plaintiff must be given the opportunity to demonstrate that "her actual partnership rights are limited enough that she should be characterized as an employee." 79 F.3d at 868.

Other circuits have looked at the specific issue of whether shareholders in a professional corporation are "employees" for purposes of the antidiscrimination laws, and have come to differing conclusions. For example, in Equal Employment Opportunity Commission v, Dowd & Dowd. Ltd.. 736 F.2d 1177 (7th Cir. 1984), the court applied an economic realities test and determined that shareholders in a professional corporation engaged in the practice of law are not employees for purposes of federal employment discrimination laws. The court

concluded that the role of a shareholder in a professional corporation is far more analogous to a partner in a partnership than it is to a shareholder of a general corporation. Id. at 1178. The court found that the economic reality of a professional corporation is that the management, control and ownership of the corporation is much like the management, control and ownership of a partnership. Id.

However, in Hyland v. New Haven Radiology Associates, 794 F.2d 793 2nd Cir. 1986), the district court applied an economic realities test and determined that the physician shareholders in a professional corporation were not employees for purposes of the federal employment discrimination laws. The circuit court reversed, and found the physician shareholders to be employees. The circuit court's position was that once the physicians had chosen a form of business organization (i.e., professional corporation), they were precluded from arguing that their corporation was essentially a medical partnership among co-equal physicians. Id. at 798. The court held that use of the corporate form precludes any examination designed to determine whether the entity more closely resembles a partnership. Id.

I find that the Dowd case is a better reasoned approach in that it exalts substance over form. With business entities evolving rapidly beyond the standard traditional forms (for example, the new limited liability companies and limited liability partnerships), the question of who is an employee will have to be looked at on the basis of economic realities, because the labels will not answer the question. Further, the Dowd approach is consistent with the approach set out in the Ninth Circuit's analysis in Strother for the distinction between a true partner and an employee.

Strother directs the court to Look at the true relationship among the individuals, including the method of compensation, the responsibility for the entity's liabilities, and the management structure and role in that management, to determine if an individual should be treated as an employee for the purpose of employment discrimination laws. This is in effect an economic realities test.

The record in this matter indicates that the four physician shareholders of defendant constitute the board of directors. They own the professional corporation, and control the management and operations of the medical practice. They each share in the profits of the professional corporation by annual bonuses. Under Oregon law, they remain personally liable for malpractice claims against them, but have limited liability with respect to corporate obligations.

I conclude that the role of the four shareholders in the defendant professional corporation is that of employers who own and manage their own business. The economic reality is that they are more analogous to partners in a partnership than to shareholders in a general corporation. I conclude that the four physician shareholders are not employees for purposes of the federal antidiscrimination laws. Therefore, I recommend that defendant's motion for summary judgment with respect to the ADA coverage issue granted. There are no genuine issues of material fact. Defendant's physician shareholders are not employees for purposes of the ADA and, thus, the professional corporation is not covered by the ADA.

SUPPLEMENTAL JURISDICTION

28 U.S.C. § 1367, which applies to cases commenced

after December 1, 1990, provides the basis for supplemental jurisdiction:

> Except as otherwise provided in subsection (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over ali other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

Subsection (c) of 28 U.S.C. § 1367 gives the court discretion to "decline to exercise" tile supplemental jurisdiction in various circumstances including when "the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3). The comments to the rule note;

Whether a dismissal of the touchstone claim should bring about a dismissal (or remand, in a removal situation) of the dependent claim for want of supplemental jurisdiction should hinge on the moment within the litigation when the dismissal of the touchstone claim takes place. . . . If for example, the main claim is dismissed early in the action, befcre any substantial preparation has gone into dependent claims, dismissing or remanding the latter upon declining supplemental jurisdiction seems fair enough.

28 U.S.C.A. § 1367, p. 224 (West Supp. 1991).

In this case, I use my discretion to decline to exercise supplemental jurisdiction over plaintiff's pendent state law claims since it is early in the case and no substantial preparation (other than that necessary to the ADA claim) has gone into the pendent state law claims. Thus, I recommend that plaintiffs pendent state law claims be dismissed without prejudice.

CONCLUSION

Defendant's motion (# 9) for summary judgment, with respect to plaintiff's First Claim for Relief; should be GRANTED. The remainder of defendant's summary judgment motion should be DENIED as moot. Plaintiff's Second and Third Claims for Relief should be DISMISSED without prejudice.

DATED this 22, day of March 2000.

DONALD C, ASHMANSKAS
United States Magistrate Judge

SCHEDULING ORDER

Objections to these Findings and Recommendation(s), if any, are due April 5, 2000. If no objections are filed, the Findings and Recommendation(s) will be referred to a district court judge and go under advisement on that date.

If objections are filed, the response is due no later than April 19, 2000. When the response is due or filed, whichever date is earlier, the Findings and Recommendation(s) will be referred to a district court

judge and go under advisement.

Footnote

[1] The Ninth Circuit uses the "economic realities" test to determine employee status. Lutcher v. Musician Union Local 47, 633 F.2d 880, 883 (9th Cir. 1980).

Civil No. 99-406-AS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DEBORAN ANNE WELLS,
Plaintiff,

v.

CLACKAMAS GASTROENTEROLOGY ASSOCIATES PC,
an Oregon corporation,
Defendants.

Filed May 5, 2000

ORDER

Magistrate Judge Donald C. Ashmanskas filed his Findings and Recommendation on March 22, 2000. The matter is now before me pursuant to 26 U.S.C. § 636(b) (1) (B) and Fed. R. Civ. P. 72(b). When either party objects to any portion of the Magistrate Judge's Findings and Recommendation, the district court must make a de novo determination of that portion of the Magistrate Judge's report. 28 U.S.C. § 636(b) (1) (C); McDonnell Douglas Corp. v. Commodore Business Machines, Inc., 656 F. 2d 1309, 1313 (9th Cir. 1981), cert. denied, 455 U.S. 920 (1982).

Plaintiff has filed timely objections. I have, therefore, given the file of this case a novo review. I ADOPT Magistrate Judge Ashmanskas's Findings and Recommendation. Defendant's motion (#9) for summary judgment, with respect to plaintiff's First Claim f or Relief, is granted. The remainder of defendant's

summary judgment motion is denied as moot. Plaintiff 's Second and Third Claims for Relief are dismissed without prejudice.

IT IS SO ORDERED.

DATED this 5, day of May, 2000.

OWEN M. PANNER
U.S. DISTRICT COURT
JUDGE

Civil No. 99-406-AS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DEBORAN ANNE WELLS,
Plaintiff,

v.

CLACKAMAS GASTROENTEROLOGY ASSOCIATES PC,
an Oregon corporation,
Defendants.

Filed June 2, 2000

JUDGMENT OF DISMISSAL

OWEN M. PANNER, District Judge:

Consistent with the Order (# 43) of this court, filed May 5, 2000, adopting the Findings and

Recommendation (# 37) by U.S. Magistrate Judge Donald C. Ashmanskas, filed March 22, 2000, IT IS ORDERED and ADJUDGED that Plaintiff's case is DISMISSED with prejudice.

Pending motions, if any, are DENIED as moot.

DATED this 31, day of May 2000.

OWEN M. PANNER
U.S District Court Judge

No. 99-406-AS

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

DEBORAH ANNE WELLS,
Plaintiff,

v.

CLACKAMAS GASTROENTEROLOGY ASSOCIATES, P.C.,
an Oregon Corporation,
Defendant.

6/7/2000

PLAINTIFF'S NOTICE OF APPEAL

Notice is hereby given that Deborah Anne Wells, plaintiff in the above named case, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Findings and Recommendations entered in this case on March 22, 2000, and affirming Order entered on May 5, 2000, copies of which are attached

Dated this 2nd day of June, 2000.

Crispin & Associates

Craig A. Crispin, OSB No. 82485
Shelley D. Russell, OSB No. 94068
Of Attorneys for Plaintiff Susan Farmer
Telephone 503-293-5770

No. 00-35545

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEBORAH ANNE WELLS,
Plaintiff-Appellant,

v.

CLACKAMAS GASTROENTEROLOGY ASSOCIATES, P.C.,
an Oregon Corporation,
Defendant-Appellee.

September 13, 2001, Argued and Submitted, Portland, Oregon

November 26, 2001, Filed

COUNSEL:
Craig A. Crispin, Portland, Oregon, for the plaintiff-appellant.

Steven W. Seymour, Portland, Oregon, for the defendant-appellee.

JUDGES:
Before: David R. Thompson, A. Wallace Tashima, and Susan P. Graber, Circuit Judges. Opinion by Judge Tashima; Dissent by Judge Graber.

OPINION BY:
A. Wallace Tashima

OPINION:

TASHIMA, Circuit Judge:

Plaintiff-Appellant Deborah Anne Wells appeals from the order of the district court granting summary judgment in favor of Defendant-Appellee Clackamas Gastroenterology Associates, P.C. (Clackamas) on her claim under the Americans With Disabilities Act of 1990 (ADA). The district court held that Clackamas was not an "employer," and therefore not a "covered entity," within the meaning of the ADA because it did not have 15 or more employees during the relevant time periods. We must decide whether Clackamas' physician-shareholders were "employees" within the meaning of the ADA. We have jurisdiction pursuant to *28 U.S.C. § 1291*, and we reverse.

I. BACKGROUND

Wells was an employee of Clackamas, an Oregon professional corporation, from 1986 until her termination in May 1997. During the relevant time period, four physician-shareholders, all of whom participated in the management and operations of the medical practice, were the shareholders and directors of Clackamas. In addition to the physician-shareholders, 12-15 other persons were employed by Clackamas during this time period.

When Clackamas terminated Wells' employment, she brought an action against Clackmas alleging unlawful discrimination on the basis of disability under Title I of the ADA, *42 U.S.C. § § 12101*-12117, and Or. Rev. Stat. § § 659.436-659.449. She also brought a claim for common law wrongful discharge.

Clackamas moved for summary judgment against Wells' ADA claim, arguing that it was not an "employer "and, consequently, not a "covered entity," within the meaning of the ADA because it did not have 15 or more employees for the 20 weeks required by the statute. It is

undisputed that if Clackamas' physician-shareholders are not counted as" employees," then it would have had too few employees to qualify as an "employer." On the other hand, if the physician-shareholders are counted as "employees," then the number of employees would have exceeded the number required to bring Clackamas under the coverage of the ADA. Relying on the "economic realities" test, Clackamas argued that its four physician-shareholders should be regarded as "partners" and not as "employees" within the meaning of *42 U.S.C. § 12111*(4) & (5).

The magistrate judge accepted Clackamas' argument and recommended that the court grant the motion for summary judgment on the ADA claim and decline to exercise supplemental jurisdiction over the remaining claims. The district court accepted the recommendations of the magistrate judge in their entirety and entered judgment dismissing the action. Wells timely appeals.

II. STANDARD OF REVIEW

We review a district court's grant of summary judgment de novo and must determine whether, viewing the evidence in the light most favorable to the non-moving party, there are any genuine issues of material fact and whether the district court correctly applied the substantive law. *Lopez v. Smith, 203 F.3d 1122, 1131 (9th Cir. 2000)* (en banc).

III. DISCUSSION

Whether shareholders of a professional corporation who are actively engaged in conducting the business of the corporation are "employees" under the ADA is an issue of first impression in this Circuit. Under the ADA, it is unlawful for a "covered entity" to discriminate against a qualified individual with a disability on the basis of that disability. *42 U.S.C. §*

12112(a). The term "covered entity" includes an "employer." Id. § 12111(2). An "employer" is defined as "a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year." Id. § 12111(5)(A). An "employee" is defined as "an individual employed by an employer." Id. § 12111(4).

No circuit has interpreted these specific provisions of the ADA. There are, however, a number of cases that interpret nearly identical language in other federal employment discrimination statutes, including Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act. These same cases also state that their interpretations should apply to all employment discrimination statutes. See e.g., *Serapion v. Martinez, 119 F.3d 982, 985 (1st Cir. 1997)* ("We regard Title VII, ADEA, ERISA, and FLSA as standing in pari passu and endorse the practice of treating judicial precedents interpreting one such statute as instructive in decisions involving another."); *Hyland v. New Haven Radiology Assocs., P. C., 794 F.2d 793,.796 (2d Cir. 1986)* (holding that for the FLSA, Title VII, and the ADEA, "cases construing the definitional provisions of one are persuasive authority when interpreting the others").

In *EEOC v. Dowd & Dowd, Ltd., 736 F.2d 1177 (7th Cir. 1984)*, the Seventh Circuit applied an "economic realities" test and concluded that "a shareholder in a professional corporation is far more analogous to a partner in a partnership than it is to the shareholder of a general corporation. " *Id. at 1178.* On this basis, the court concluded that because they are "really" partners, shareholders in professional corporations are not to be counted as employees for purposes of federal employment discrimination law. Id.

This approach was rejected by the Second Circuit in Hyland. In Hyland, the court held that the use of the corporate form, including a professional corporation, "precludes any examination designed to determine whether the entity is in fact a partnership." *794 F.2d at 798.* The incorporators of a professional corporation make a deliberate decision to adopt the corporate form for their business in order to avail themselves of important tax, employee benefit, and civil liability advantages. Id. Having freely made the choice to adopt this form of business organization "they should not now be heard" to say that their firm is "essentially a medical partnership," and not a corporation. Id.

Given the broad purpose of the ADA, see *42 U.S.C. § 12101*, we find Hyland's reasoning to be considerably more persuasive than Dowd's. Because the decision to incorporate is presumably a voluntary one, there is no reason to permit a professional corporation to secure the "best of both possible worlds" by allowing it both to assert its corporate status in order to reap the tax and civil liability advantages and to argue that it is like a partnership in order to avoid liability for unlawful employment discrimination. Therefore, following the Second Circuit's reasoning in Hyland, we hold that Clackamas' shareholder-employees should be counted as" employees" under the ADA and "that any inquiry respecting partnership status [is] irrelevant." *Hyland, 794 F.2d at 798.*

Clackamas contends that *Strother v. Southern California Permanente Medical Group, 79 F.3d 859 (9th Cir. 1996)*, directs the court to use the "economic realities test" in this case. Strother, however, is distinguishable from this case and does not address the split between Dowd and Hyland regarding the status of shareholders of a professional corporation. In Strother, a case arising under state law, we held that partners can,

under appropriate circumstances, be deemed to be employees for the purposes of the employment discrimination laws.

It is one thing to apply an "economic realities "test to determine that a nominal partner should, under appropriate circumstances, be considered an "employee" in order to prevent a firm from labeling the bulk of its employees as partners simply to insulate itself from liability for discrimination. It is quite another thing, however, to apply the "economic realities" test in order to classify shareholder-employees of a corporate enterprise as partners. See *Hyland, 794 F.2d at 798.* While the shareholders of a corporation may or may not be "employees," they can never be partners in that corporation because the roles are "mutually exclusive." Id.

In the case at bench, the status of Clackamas' four physician-shareholders as employees is clear. During the relevant time periods, in addition to being shareholders and directors of Clackamas, the four physician-shareholders actively participated in the management and operation of the medical practice and literally were employees of the corporation under employment agreements. Therefore, the physician-shareholders of Clackamas should be regarded as" employees" within the meaning of *42 U.S.C. § 12111*(4) & (5); consequently, Clackamas had a sufficient number of employees to qualify as an "employer" and as a "covered entity" under the statute.

IV. CONCLUSION

Because we conclude that Clackamas' physician-shareholders are employees of the corporation, not partners in it, the district court's grant of summary judgment in favor of Clackamas is reversed and the case

is remanded for further proceedings consistent with this opinion.

REVERSED and REMANDED.

DISSENTBY:
Susan Graber Susan Graber . Graber

DISSENT:

GRABER, Circuit Judge, dissenting:

I respectfully dissent. For three reasons, *EEOC v. Dowd & Dowd, Ltd., 736 F.2d 1177 (7th Cir. 1984),* expresses the more persuasive approach in the context of this case:[1] (1) our circuit has cautioned against being governed by labels, rather than realities; (2) a physicians' professional corporation in Oregon has many attributes of a partnership as a matter of law and is not merely an ordinary commercial corporation; and (3) the purpose of the numerical requirement in the ADA is to separate small from large enterprises, not to adhere to the vagaries of tax law or tort liability. Like the district court, I would apply the "economic realities" test and would conclude that Defendant's physician-shareholders were not" employees" within the meaning of the ADA.

1. The Significance of Strother

In *Strother v. Southern California Permanente Medical Group, 79 F.3d 859, 865-68 (9th Cir. 1996),* we held that "partners" can be considered "employees "under a state anti-discrimination statute that borrowed concepts from federal law. There, a partner in a medical partnership consisting of more than 2,000 partners had sued the medical partnership. The district court held that the plaintiff could not maintain the action because she was a partner in the defendant entity and was a

party to its partnership agreement. We reversed, holding that the plaintiff should have an opportunity to prove that she was functionally an employee (for example, had neither the power nor the duty to participate in the management and the control of the defendant firm), rather than a partner in the normal sense. *Id. at 867-68.* We noted, for example, that the defendant entity was controlled by a board of directors over which the plaintiff exercised "little control and to which she [had] limited access." *Id. at 867.*

Although I agree that Strothers is not controlling here, it at least suggests that economic realities are more important than labels. That principle should remain true when the s..oe is on the defendant's foot.

Indeed, even the Second Circuit has backed away a bit from the bright-line test suggested by *Hyland v. New Haven Radiology Assocs., P. C., 794 F.2d 793 (2d Cir. 1986).* In a later case, the Second Circuit observed that, although the shareholders of a professional corporation cannot be considered partners, it does not follow that every such shareholder also is an "employee" of the professional corporation. *EEOC v. Johnson & Higgins, Inc., 91 F.3d 1529, 1538 (2d Cir. 1996).* For example, if a shareholder sits on the board of directors but is not involved in the day-to-day management or operation of the firm, then the shareholder is more akin to an "employer," rather than being an "employee. "Id. This case brought the Second Circuit's approach somewhat closer to the Seventh Circuit's. See *Chavero v. Local 241, 787 F.2d 1154, 1157 (7th Cir. 1986)* (holding that members of the board of directors are not employees unless they "perform traditional employee duties"); *Zimmerman v. N. Am. Signal Co., 704 F.2d 347, 352 (7th Cir. 1983)* (holding that directors and "unpaid, inactive officers" are not corporate "employees"). In other words, "economic realities" play some role even in

the Second Circuit, and Strother counsels that economic realities should play a major role in the Ninth Circuit.

2. The Nature of This Professional Corporation

A professional corporation has some attributes of an ordinary incorporated business, but it is not identical and retains attributes of a professional partnership. The use of the word "corporation" in both contexts should not constrain our inquiry.

In Oregon, a physicians' professional corporation, like this one, preserves the professional relationship between the physicians and their patients, as well as the standards of conduct that the medical profession requires. Or. Rev. Stat. § 58.185(2). Further, "a shareholder of the corporation is personally liable as if the shareholder were rendering the service or services as an individual" with respect to all claims of negligence, wrongful acts or omissions, or misconduct committed in the rendering of professional services. Or. Rev. Stat. § 58.185(3) (emphasis added). A licensed professional also is jointly and severally liable for such claims, albeit with some dollar limitations. Or. Rev. Stat. § 58.185(4)-(9). Ordinary business corporation rules apply only to other aspects of the entity, apart from the provision of professional services. Or. Rev. Stat. § 58.185(11). A professional corporation's activities must remain consistent with the requirements of the type of license in question, Or. Rev. Stat. § 58.205, and it may merge only with other professional corporations, Or. Rev. Stat. § 58.196, so the provision of professional services – with its attendant liabilities – must remain at the heart of a P.C. like this defendant.[2]

Additional special rules apply to professional corporations that are organized to practice medicine, none of which apply to ordinary business corporations. A majority of the directors, the holders of the majority

of shares, and all officers except the secretary and treasurer must be Oregon-licensed physicians. Or. Rev. Stat. § 58.375(1)(a)-(c). The Board of Medical Examiners is given express statutory authority to require more than a majority of shares, and more than a majority of director positions, to be held by Oregon-licensed physicians. Or. Rev. Stat. § 58.375(1)(d) & (e). The Board of Medical Examiners also may restrict the corporate powers of a professional corporation organized for the purpose of practicing medicine, beyond the restrictions imposed on ordinary business corporations. Or. Rev. Stat. § 58.379. Lastly, Or. Rev. Stat. § § 58.375 through 58.389 contain impediments to the transfer of shares and other corporate activities.

In short, even without considering the economic realities of this particular P. C., it is apparent that a physicians' professional corporation in Oregon retains important legal aspects of a partnership. On this record, it also is clear that the four physician-shareholders are the Defendant entity's directors, participate in the management and operation of the entity's medical practice, attend monthly management meetings, and share profits from the professional corporation through an annual bonus system. Because they in fact exercised full control over the medical practice, shared profits, and remained jointly and severally liable to patients on medically related claims, the physician-shareholders should be classified as partners, rather than employees.

3. The Reason for the ADA Classification

The apparent reason for limiting the ADA's coverage to entities with 15 or more employees in each of 20 or more calendar weeks in the current or preceding calendar year, *42 U.S.C. § 12111*(5)(A), is to divide larger businesses from smaller ones. Congress decided "to spare very small firms from the potentially crushing expense of mastering the intricacies of the

antidiscrimination laws, establishing procedures to assure compliance, and defending against suits when efforts at compliance fail." *Papa v. Katy Indus., Inc., 166 F.3d 937, 940* (7th Cir.) (discussing the congressional purpose" of exempting tiny employers from the antidiscrimination laws," including the ADA), cert. denied, *528 U.S. 1019, 145 L. Ed. 2d 408, 120 S. Ct. 526 (1999)*; see also *Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 587 (9th Cir. 1993)* (recognizing that Congress exempted small employers from the ADEA and Title VII of the Civil Rights Act in order to protect them from "the costs associated with litigating discrimination claims").[3]

The result of the majority's opinion is that Clinic # 1, this defendant, is a "covered entity" for ADA purposes, while Clinic # 2 next door, which is identical in all respects except in its four physicians' decision not to adopt a P.C. format, is not a covered entity. Because the very purpose of the 15-employee threshold is economic, it makes no sense to treat Clinic # 1 and Clinic # 2 differently.

4. Conclusion

In my view, the Ninth Circuit should adopt the majority rule – an "economic realities" test – to determine whether a shareholder in a professional corporation is an" employee" within the meaning of the ADA. As Plaintiff and the panel majority acknowledge, if we applied that test to this case we would have to affirm the judgment of the district court. I therefore dissent from the decision to reverse and remand.

Footnotes

[1] The other circuits that have examined this question have followed the Seventh Circuit's approach in Dowd: *Devine v. Stone, Leyton & Gershman, P.C., 100 F.3d 78, 80-81 (8th Cir. 1996); Fountain v. Metcalf, Zima & Co., P.A., 925 F.2d 1398, 1400-01 (11th Cir. 1991).* It appears that no circuit other than the Second has adopted the Hyland approach.

[2] In Oregon, the distinction between partnerships of professionals and professional corporations is diminishing further. Oregon is currently phasing in a new set of statutes that will govern all Oregon partnerships after January 1, 2003. 1997 Or. Laws, ch. 775, § 34. Under Or. Rev. Stat. § 67.105(4), the liability of partners in a limited liability partnership of professionals will be governed by professional-corporation law:

> Notwithstanding subsection (3) of this section, the partners of a limited liability partnership who are professionals shall be personally liable in their capacity as partners to the same extent and in the same manner as provided for shareholders of a domestic professional corporation under ORS 58.185 and 58.187 and as otherwise provided in this chapter.

The fact that the law governing business entities is subject to a change that will result in having two differently named business structures share significant common features (as well as the fact that the law of business organizations varies from state to state) is an additional reason to adopt an "economic realities" test instead of one that relies solely on labels.

[3] Additionally, Congress made a judgment about how

large a business has a presumed effect on interstate commerce.

(Certificate or affidavit of service omitted in printing).

(6)

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In the

Supreme Court of the United States

CLACKAMAS GASTROENTEROLOGY ASSOCIATES, P.C.,

Petitioner,

v.

DEBORAH ANNE WELLS,

Respondent.

ON A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

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PETITION FOR WRIT FILED MARCH 26, 2002
CERTIORARI GRANTED OCTOBER 1, 2002

31 pp

QUESTION PRESENTED

Clackamas Gastroenterology Associates, P.C. is a medical clinic formed as a professional corporation but which operates and has legal attributes of a partnership.

The question presented is whether a federal court should apply an economic realities test to determine if the Clinic's physician-shareholders are counted as "employees" for the purpose of determining if the Clinic is a "covered entity" subject to The Americans With Disabilities Act (hereinafter "ADA") and other federal anti-discrimination statutes.

In this case, the Ninth Circuit concluded that the physician-shareholders are employees. The court below rejected the holdings of the Seventh, Eighth and Eleventh Circuits which used an economic realities test. Instead, it adopted the reasoning of the Second Circuit which rejected that test.

PARTIES TO THE PROCEEDINGS

Petitioner

Clackamas Gastroenterology Associates, P.C., an Oregon professional corporation. It has no parent corporation. No publicly held company owns ten percent or more of its stock.

Respondent

Deborah Ann Wells.

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OPINIONS BELOW

This action was initiated by the Respondent (hereinafter referred to as "Wells") in the United States District Court for the District of Oregon, and that Court entered summary judgment in favor of Petitioner (hereinafter referred to as the "Clinic"). The Findings and Recommendations of the District Court Magistrate were referred to the District Court Judge and are reprinted in J.A. 83; and the Order Granting Summary Judgment is reprinted in J.A. 93.

Wells appealed to the United States Court of Appeals for the Ninth Circuit, Case No. 00-35545, and that Court entered an Opinion on November 26, 2001. The Opinion is reprinted in J.A. 97. The citation for the Opinion is 271 F.3d 903 (9th Cir. 2001).

BASIS FOR JURISDICTION IN THIS COURT

This action was filed in the United States District Court for the District of Oregon. The Court entered summary judgment in favor of the Clinic. Wells timely appealed to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit entered its order on November 26, 2001. No petition for rehearing was sought.

On February 15, 2002, Justice O'Connor extended the time for Petitioner to file a Petition for a Writ of Certiorari to and including March 26, 2002. The Petition for Writ of Certiorari was timely filed on March 26, 2002 under Supreme Court Rule 13(1). The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. §12101(b)(1) and (2).

(b) Purpose

It is the purpose of this chapter –

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

42 U.S.C. §12111(2), (4), and (5)(A)
Definitions under the Americans with Disabilities Act.

(2) Covered entity

The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee.

(4) Employee

The term "employee" means an individual employed by an employer. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(5) Employer
(A) In general

The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

42 U.S.C. §12112(a) Discrimination under the Americans with Disabilities Act.

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. §12116 Regulations.

Not later than 1 year after July 26, 1990, the Commission shall issue regulations in an accessible format to carry out this title in accordance with

subchapter II of chapter 5 of title 5, United States Code.

42 U.S.C. §12117(a) Enforcement.

(a) Powers, remedies, and procedures

The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

STATEMENT OF THE CASE

Petitioner (hereinafter, the "Clinic") is a medical clinic organized in 1979 as an Oregon professional corporation. Since July 1994 and for all times relevant to this proceeding, it had four physician-shareholders who owned the professional corporation and who constituted the board of directors. J.A. 29, 35, and 75. They attended monthly board meetings and controlled the management and operations of the medical practice. J.A. 35. They shared profits from the professional corporation through an annual bonus. J.A. 35. Although it was organized as a professional corporation, the physician-shareholders regarded themselves as partners. J.A. 65 and 71. Under Oregon law, they remain personally liable for malpractice claims against them, but have limited liability with respect to corporate obligations. OR. REV. STAT. §58.185 (2001).

The Respondent (hereinafter "Wells") was, until she voluntarily terminated in May 1997, employed as the Clinic's bookkeeper with responsibility for patient collections. J.A. 30, 35, and 76.

On April 24, 1997, Wells was offered a transfer to the patient coordinator/receptionist position, a less demanding job, because she was not able to satisfactorily perform her duties as bookkeeper. J.A. 36. Wells refused the transfer and, instead, took medical leave and applied for disability. J.A. 31, 32, 36, 69, 77, and 78.

Wells did not return to work or contact the Clinic, so she was determined to have voluntarily resigned in accordance with the Clinic's unexcused absence policy. J.A. 31, 37, and 77.

After she terminated, Wells brought an action against the Clinic under Title I of the ADA, 42 U.S.C. § 12101-12117, and other supplemental state claims.

The Clinic moved for summary judgment against Wells' ADA claims on the grounds that it was not an "employer" as defined by the Act and, consequently, not a "covered entity" within the meaning of the ADA because it did not have 15 or more employees for 20 weeks in the current or prior calendar years as required by the statute. The outcome hinged on whether the physician-shareholders were counted as employees. If the physician-shareholders were not counted as employees, it is uncontested that the Clinic had 15 employees for 10 weeks in calendar year 1996 (the "previous calendar year") and eight weeks in 1997 (the "current calendar year"). J.A. 35. If, on the other hand, the physician-shareholders were counted, the Clinic would have had 15 or more employees for 20 or more weeks in 1996 and 1997.

The District Court granted summary judgment for the Clinic and dismissed Wells' complaint. J.A. 95. Wells appealed. A panel of the Ninth Circuit reversed the District Court's decision in a two to one ruling. J.A. 97.

The Clinic petitioned this Court for a Writ of Certiorari which was granted on October 1, 2002.

SUMMARY OF THE ARGUMENT

A. FEDERAL COURTS SHOULD EXAMINE ECONOMIC REALITIES.

Federal Courts should apply an economic realities test to determine if the shareholders in a professional corporation are counted as "employees" for the purpose of determining if the professional corporation is a "covered entity" subject to the ADA and other federal anti-discrimination statutes.

In Oregon, a professional corporation is similar, but not identical, to an ordinary incorporated business; it retains significant attributes of a professional partnership, as well. Oregon is not alone. Most states have enacted laws which preserve aspects of professional partnerships in professional corporations.

The four shareholders in the Clinic involved in this case regarded themselves more as partners in a partnership than as shareholders in a corporation. All four participated in the management and operation of the Clinic's medical practice, attended monthly management meetings and shared in profits from the practice through an annual bonus system. The economic reality is that the four physician-shareholders in the Clinic are more analogous to partners in a partnership than to shareholders in an ordinary corporation.

It is undisputed that if the Clinic's physician-shareholders are not counted as "employees," then it would have had too few employees to qualify as an "employer." The ADA only applies to an "employer," defined as a "person engaged in an industry affecting commerce who has 15 or more employees for each

working day in each of 20 or more calendar weeks in the current or preceding calendar year." 42 U.S.C. §12111(5)(A). An "employee" is defined as "an individual employed by an employer." 42 U.S.C. §12111(4).

Courts should apply an economic realities test to determine whether physician-shareholders, such as the four physicians in the Clinic, are, in reality, partners, and not "employees," under the ADA. Such an examination of the economic realities of a business entity yields a result that is evenhanded, consistent and flexible.

Fairness demands that courts look past the business form and examine the true relationship between the individual and the enterprise. It makes no sense to treat virtually identical small businesses differently because they have adopted different forms of organization. The reason for limiting the ADA's coverage to entities with 15 or more employees is to divide larger business from smaller ones. Congress decided "to spare very small firms from the potentially crushing expense of mastering the intricacies of the anti-discrimination laws, establishing procedures to assure compliance, and defending against suits when efforts at compliance fail." *Papa v. Katy Industries, Inc.*, 166 F.3d 937, 940 (7th Cir. 1999) (Discussing the Congressional purpose "of exempting tiny employers from the anti-discrimination laws including the ADA"), Cert. Denied, 528 U.S. 1019 (1999).

The purpose of the ADA is, in part, to provide consistent standards. 42 U.S.C. §12101(b)(2). One such standard is how courts determine whether an individual is an "employee" as that term is used in the Act. The ADA has only one definition of "employee." The term "employee" is used both to determine whether an entity

is covered by the Act, 42 U.S.C. §12111(2) and (5)(A), and whether an individual has a right to sue under the Act, 42 U.S.C. §12112(a), and 42 U.S.C. §12117(a). The Act's admonition to provide consistent standards strongly suggests that the test used to determine whether an individual has a right to sue should be the same test used to determine whether a business is a covered entity.

Traditional business forms are being modified by new business forms such as Limited Liability Partnerships (LLPs) and Limited Liability Corporations (LLCs). Individual participants in these new LLCs may be labeled "members" or "managers" (OR. REV. STAT. §63.130 (2001)), and their employment relationships and roles may vary. As American business changes, reliance solely on business form to determine who is an employee becomes less dependable. Application of an economic realities test yields a more flexible and ultimately more consistent result.

B. A BUSINESS ENTITY'S USE OF THE CORPORATE FORM SHOULD NOT PRECLUDE A COURT FROM INVESTIGATING REALITIES.

Business owners, workers, practitioners and the public are all better served when courts are able to look past labels to investigate economic realities. This Court applied such an economic realities test under similar (although not identical) circumstances in *Goldberg v. Whitaker House Cooperative, Inc., et al.*, 366 U.S. 28, 33 (1961)(an economic reality test was applied to determine whether home workers were employees under the FLSA); and *Nationwide Mutual Insurance Company, et al. v. Darden*, 503 U.S. 318 (1992)(agency law principles applied to determine whether an

insurance agent was an independent contractor or employee under ERISA).

A rigid rule that demands allegiance to form over substance may be easier to apply, but such a rule does not necessarily yield a result that is equitable. There is no valid reason to adopt a rule, whether or not easy to apply, that prevents a court from using a test that seeks to determine the true relationship between a business entity and an individual.

ARGUMENT

A. FEDERAL COURTS SHOULD EXAMINE ECONOMIC REALITIES.

Federal Courts should apply an economic realities test to determine if the shareholders in a professional corporation are counted as "employees" for the purpose of determining if the professional corporation is a "covered entity" subject to the ADA and other federal anti-discrimination statutes. Courts often scrutinize the facts of a particular case to determine the essence of the substance behind the form.

1. The Nature of Professional Corporations.

A professional corporation is similar, but not identical, to an ordinary incorporated business; it retains significant attributes of a professional partnership.

(a) The Origin of Professional Corporations.

Professional corporations originated in the group practice of medicine as it developed after World War II. During this time, professionals struggled to find an entity similar to an ordinary corporation in which to secure retirement and other tax related benefits for both themselves and their employees. Prior to the 1960s, both ethical and legal restraints imposed by state laws prohibited professionals from practicing through corporations. HARRY V. LAMON, JR. AND J. ALSTON THOMPSON, JR., THE COMPLETE PROFESSIONAL CORPORATION DESK BOOK (1982).

During the 1960s, states began enacting statutes

to allow professionals to form professional associations, which enabled them to adopt corporate-type retirement plans. Id. at ix. These statutes were, at least in part, in response to the refusal of the Internal Revenue Service to recognize that an association of professionals could adopt a pension plan. *See, e.g. U.S. v. Kintner*, 216 F.2d 418 (9th Cir. 1954).

By 1970 the IRS conceded that professionals may form associations which enable them to adopt corporate-type retirement plans and enjoy other tax-driven benefits such as health and medical plans and life insurance plans similar to ordinary corporations. *See* IRS Technical Information Release - 1019, August 8, 1969. Currently, those issues which triggered the genesis of professional corporations have largely disappeared, and business entities may now select tax treatment by merely checking a box on IRS Form 8832 (12-96) Entity Classification Election. Treas. Reg. §301.7701-3(c)(1)(i).

(b) Professional Corporations Retain Important Legal Aspects of a Partnership.

Notwithstanding historic efforts of professionals to obtain benefits similar to ordinary corporations, professional corporations retain significant attributes of a professional partnership.

In Oregon, a physicians' professional corporation resembles a professional partnership in several respects. The physicians' professional corporation preserves the professional relationship between the physicians and their patients, as well as the standards of conduct of the medical profession. OR. REV. STAT. §58.185(2) (2001). Oregon law provides that, "a shareholder of the

corporation is personally liable as if the shareholder were rendering the service or services as an individual" with respect to all claims of negligence, wrongful acts or omissions, or misconduct committed in the rendering of professional services OR. REV. STAT. §58.185(3) (2001). A licensed professional is jointly and severely liable for such claims, (within certain dollar limitations). OR. REV. STAT. §58.185(4)-(9) (2001). Ordinary business corporation rules apply only to other aspects of the entity, apart from the provision of professional services. OR. REV. STAT. §58.185(11) (2001). A professional corporation's activities must remain consistent with the requirements of the type of license in question, OR. REV. STAT. §58.205 (2001). A professional corporation may merge only with other professional corporations in the same profession, OR. REV. STAT. §58.196 (2001). The provision of professional services - with its attendant liabilities - must remain at the heart of a professional corporation like the Clinic in this case.

Additional special rules apply to professional corporations that are organized to practice medicine, none of which apply to ordinary business corporations. A majority of the directors, the holders of the majority of shares, and all officers except the secretary and treasurer must be Oregon licensed physicians. OR. REV. STAT. §58.375(1)(a)-(c) (2001). The Board of Medical Examiners is given express statutory authority to require more than a majority of shares and director positions to be held by Oregon licensed physicians. OR. REV. STAT. §58.375(1)(d) and (e) (2001). When a professional corporation is organized for the purpose of practicing medicine, the Board of Medical Examiners also may restrict the corporate powers beyond restrictions imposed on ordinary business corporations. OR. REV. STAT. §58.379 (2001). Finally, OR. REV. STAT. §58.375-58.389 (2001) contain impediments to the

transfer of shares and other corporate activities.[1]

Oregon is not alone. Most states have enacted laws which preserve aspects of professional partnerships in professional corporations.[2]

2. Physician-Shareholders are Analogous to Partners in a Professional Partnership.

It is not uncommon for shareholders in a professional corporation to think of themselves as partners in a partnership. The four shareholders in the Clinic involved in this case regarded themselves more as partners in a partnership than as shareholders in a corporation. J.A. 65 and 71. All four participated in the management and operation of the Clinic's medical practice, attending monthly management meetings and shared in profits from the practice through an annual

[1] Other professions in Oregon also have restrictions on non-licensed individuals owning an interest in a practice. Lawyers are not allowed to have non-lawyer partners. OREGON CODE OF PROFESSIONAL RESPONSIBILITY DR 3-103 (2001). The Oregon Board of Accountancy imposes limitations on non-certified public accountants and non-public accountants from owning an interest in accounting firms. OR. ADMIN. R. 801-010-0340 (2002). Furthermore, only licensed dentists can own an interest in a dental practice. OR. REV. STAT. § 679.020(2) (2001).

[2] Among other states, there are statutes similar to those of Oregon regarding personal liability for negligence in rendering professional services in New York (N.Y. BUS. CORP. LAW § 1505(a) (1986)); Florida (FLA. STAT. ch. 621.07 (2001)); Illinois (ILL. REV. STAT. ch. 805 § 10/8 (1993)); Michigan (MICH. COMP. LAWS § 450.226 (2002)); New Jersey (N.J. REV. STAT. § 14A:17-8 (2002)); and Georgia (GA. CODE ANN. § 14-7-7 (2002)). Furthermore, like Oregon, these states also require directors, officers and/or shareholders to be licensed professionals. See N.Y. BUS. CORP. LAW §§1507, 1508 (1986); FLA. STAT. ch. 621.09, 621.10 (2001); ILL REV. STAT. ch. 805 § 10/3.4 (1993); MICH. COMP. LAWS § 450.224 (2002); N.J. REV. STAT. § 14A:17-10 (2002); and GA. CODE ANN. §§ 14-7-4(c), 14-7-5 (2002).

bonus system. J.A. 31, 35, and 75.

An individual cannot be both an employer and employee. It is generally accepted that those who are properly classified as partners are not "employees" for purposes of the anti-discrimination statues. *See, e.g., Hishon v. King & Spalding*, 467 U.S. 69, 79 (1984). It is also generally accepted that ordinary corporate employees are "employees" for purposes of the anti-discrimination statutes. *See, e.g., Archer v. Globe Motorists Supply Co., Inc., et al.*, 833 F.Supp. 211, 213 (S.D.N.Y. 1993). The economic reality is that the four physician-shareholders in the Clinic are more analogous to partners in a partnership than to shareholders in an ordinary corporation.

3. Justice Favors Acknowledging Economic Realities.

Under the ADA, it is unlawful for a "covered entity" to discriminate against a qualified individual with a disability. 42 U.S.C. §12112(a). The term "covered entity" includes an "employer." *Id.* §12111(2). An "employer" is defined as a "person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year." *Id.* §12111(5)(A). An "employee" is defined as "an individual employed by an employer." *Id.* §12111(4).

It is undisputed that if the Clinic's physician-shareholders are not counted as "employees," then it would have had too few employees to qualify as an "employer." On the other hand, if the physician-shareholders are counted as "employees," then the number of employees would have exceeded the number required to bring the Clinic under the coverage of the

ADA.

Courts should apply an economic realities test to determine whether physician-shareholders, such as the four physicians in the Clinic, are, in reality, partners, and not "employees," under the ADA. Such an examination of the economic realities of a business entity yields a result that is even-handed, consistent and flexible.

(a) Courts Should Apply a Test That is Evenhanded.

It makes no sense to treat virtually identical small businesses differently because they have adopted different forms of organization. The reason for limiting the ADA's coverage to entities with 15 or more employees in each of 20 or more calendar weeks in the current or preceding calendar year, 42 U.S.C. §12111(5)(A), is to divide larger business from smaller ones. Congress decided "to spare very small firms from the potentially crushing expense of mastering the intricacies of the anti-discrimination laws, establishing procedures to assure compliance, and defending against suits when efforts at compliance fail." *Papa v. Katy Industries, Inc.*, 166 F.3d 937, 940 (7th Cir. 1999) (Discussing the Congressional purpose "of exempting tiny employers from the anti-discrimination laws including the ADA"), Cert. Denied, 528 U.S. 1019 (1999); *See also, Miller v. Maxwell's International, Inc.*, 991 F.2d 583, 587 (9th Cir. 1993)(recognizing that Congress exempted small employers from the ADEA and Title VII of the Civil Rights Act in order to protect them from "the costs associated with litigating discrimination claims").

The result of the Ninth Circuit Opinion is demonstrated by comparing two clinics. Clinic "A," P.C. (like the Clinic in this case) is a "covered entity" for

ADA purposes. Next door, Clinic "B," which is identical in all respects, is not a "covered entity" because its four physicians decided not to adopt the P.C. format. Since the purpose of the 15-employee threshold is economic, it makes no sense to treat Clinics "A" and "B" differently. Application of an economic realities test yields a more evenhanded result.

(b) Courts Should Apply a Test That Is Consistent.

The purpose of the ADA is, in part, to provide consistent standards. 42 U.S.C. §12101(b)(2). One such standard is how courts determine whether an individual is an "employee" as that term is used in the Act. The ADA has only one definition of "employee." That definition is as follows: "The term "employee" means an individual employed by an employer." 42 U.S.C. §12111(4). The term "employee" is used both to determine whether an entity is covered by the Act, 42 U.S.C. §12111(2) and (5)(A), and whether an individual has a right to sue under the Act, 42 U.S.C. §12112(a), and 42 U.S.C. §12117(a).

The Act's admonition to provide consistent standards strongly suggests that the test used to determine whether an individual has a right to sue should be the same test used to determine whether a business is a covered entity.

When the question is whether an individual has a right to sue, courts have generally held that the form of organization does not control whether an individual is an employee, and courts have generally examined the economic reality of the circumstances. Although no Circuit has interpreted the ADA's definition of "employee," there are several cases that interpret nearly

identical language in other federal employment discrimination statutes including Title VII of The Civil Rights Act of 1964 and The Age Discrimination in Employment Act. These same cases also state that their interpretations should apply to all employment discrimination statutes. *See, e.g. Serapion v. Martinez*, 119 F.3d 982, 985 (1st Cir. 1997) ("we regard Title VII ADEA, ERISA and FLSA as standing in pari passu and endorse the practice of treating judicial precedence interpreting one such statute as instructive in decisions involving another."); *Hyland v. New Haven Radiology Associates, P.C.*, 794 F.2d 793, 796 (2nd Cir. 1986) (holding that for the FLSA, Title VII and the ADEA, "cases construing the definitional provisions of one are persuasive authority when interpreting the others").

In *EEOC v. Peat, Marwick, Mitchell and Company*, 775 F.2d 928 (8th Cir. 1985), the EEOC was allowed to investigate by subpoena whether some of the 1,300 partners were in fact employees. In *Strother v. Southern California Permanente Medical Group*, 79 F.3d 859 (9th Cir. 1996), the Ninth Circuit applied an economic realities test to determine if a claimant had a right to sue. It held that a court must

> "[A]nalyze the true relationship among partners, including the method of compensation, the "partners" responsibilities for partnership liabilities, and the management's structure and the "partners" role in management, to determine if an individual should be treated as a partner or an employee for the purpose of employment discrimination laws."

Id. at 867.

In *Strother*, the medical partnership in which the plaintiff was a partner had 2,400 to 2,500 partners. The affairs of the partnership were conducted predominantly by a board of directors, over which the plaintiff had little control and to which she had limited access. Her compensation was determined by her performance, and she could be disciplined for poor performance. The Ninth Circuit remanded to the District Court finding that the plaintiff must be given the opportunity to demonstrate that "her actual partnership rights are limited enough that she should be characterized as an employee." *Id.* at 868.

Whether an entity is covered by the Act and whether an individual has a right to sue under the Act are really two sides of the same coin. To be consistent, courts should examine both sides of the coin using the same test.

Examination of economic realities is not only a test for courts to use, it also plays a part in the investigation of anti-discrimination cases. The EEOC is the federal agency charged with promulgating regulations to carry out the purposes of the ADA. 42 U.S.C. §12116. In its "EEOC Compliance Manual Directives Transmittal No. 915.003(2000)(http://www.eeoc.gov/docs/threshold.html #2-III-A-1-d), the EEOC outlines what amounts to an economic realities test for its investigators to use to determine whether a partner in a partnership should be considered an employee.

There is no reason to treat business entities differently based solely on whether the claimant has an ownership interest in the entity. Indeed, such an approach would run contrary to the purpose of the ADA to provide consistent standards. 42 U.S.C. §12101(b)(2).

An economic realities test should be used to determine not only whether partners, in reality, should be considered employees under the ADA, but also to determine whether shareholders of a professional corporation should be, in reality, considered partners. Federal Courts should apply an economic realities test to determine if a person is an employee under the ADA, whether the issue is coverage (to determine if a shareholder in a professional corporation is an employee under the anti-discrimination laws) or the issue is right to sue (to determine if a partner is an employee under the anti-discrimination laws). There is no reason to disapprove the former and approve the latter. To be consistent, courts should apply an economic realities test whether the issue is coverage or right to sue. An economic realities test results in a more consistent result.

(c) Courts Should Apply a Test That is Flexible.

The advantages that originally lured professionals into forming professional corporations have eroded over time with the easing of eligibility requirements for retirement plans and other tax-driven workplace benefits. Traditional business forms are being superseded by new business forms such as Limited Liability Partnerships (LLPs) and Limited Liability Corporations (LLCs). Individual participants in these new LLCs may be labeled "members" or "managers" (OR. REV. STAT. §63.130 (2001)) and their employment relationships and roles may vary. As American business changes, reliance solely on business form to determine who is an employee becomes less dependable.

The question of who is an employee should be examined on the basis of economic realities. Fairness

demands that courts look past the business form and examine the true relationship between the individual and the enterprise. Application of an economic realities test yields a more flexible result.

B. A BUSINESS ENTITY'S USE OF THE CORPORATE FORM SHOULD NOT PRECLUDE A COURT FROM INVESTIGATING REALITIES.

Business owners, workers, practitioners and the public are all better served when courts are able to look past labels to investigate economic realities. This court adopted such an economic realities test in *Goldberg v. Whitaker House Cooperative, Inc., et al.*, 366 U.S. 28, 33 (1961)(an economic reality test was applied to determine whether home workers were employees under the FLSA). This court also embraced examination of realities when asked to construe the meaning of "employee" as used in ERISA in *Nationwide Mutual Insurance Company, et al. v. Darden*, 503 U.S. 318 (1992) (agency law principles applied to determine whether an insurance agent was an employee under ERISA). While neither *Goldberg* nor *Darden* quite fit the mold of the question presented in this case, they do illustrate the wisdom of favoring substance over form.

Form is exalted over substance when courts rely strictly on a label to determine the true relationship between a business entity (e.g., a "partnership" or "professional corporation") and an individual (e.g., a "partner" or "employee"). In *Fountain v. Metcalf, Zima & Company, P.A.*, 925 F.2d 1398 (11th Cir. 1991) the U.S. Court of Appeals for the Eleventh Circuit observed that the evidentiary value of a label is extremely limited. *Id.* at 1401. Cases which extol the virtue of label reliance are scarce, and with good reason. In *Hishon v. King &*

Spalding, 467 U.S. 69, 79 (1984) this Court, in a concurrence by Justice Powell, stated that "of course, an employer may not evade the strictures of Title VII simply by labeling its employees as 'partners'. . ." The Court of Appeals for the Eighth Circuit observed in *Devine v. Stone, Leyton & Gershman, P.C.*, 100 F.3d 78 (8th Cir. 1996), that employment relationships vary greatly and often defy easy categorization. *Id.* at 81. A rigid rule that demands allegiance to form over substance may be easier to apply, but such a rule does not necessarily yield a result that is even-handed, consistent, and flexible. There is no valid reason to adopt a rule, whether or not easy to apply, that prevents a court from using a test that seeks to determine the true relationship between a business entity and an individual.

The economic realities test is a test that determines the true relationship between a business entity and an individual. It should be applied here, and the Clinic's physician-shareholders should not be counted as "employees" for the purpose of determining if the Clinic is a "covered entity" subject to the ADA.

CONCLUSION

The judgment of the Court of Appeals should be reversed, and the case remanded for further proceedings.

Respectfully submitted,

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In The

Supreme Court of the United States

CLACKAMAS GASTROENTEROLOGY ASSOCIATES, P.C.,

Petitioner,

v.

DEBORAH WELLS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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STATEMENT OF THE QUESTION PRESENTED

Whether when physicians elect the corporate form of business structure with its attendant responsibilities and benefits and enter into employment contracts with the corporation, the employee-shareholders should be counted as employees for purposes of determining whether the corporate employing entity is amenable to an action under the ADA by an admitted employee.

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STATEMENT OF THE CASE

Factual Background

Respondent Wells ("Wells") was employed by petitioner medical clinic (the "Clinic") from 1986 until her termination in May 1997. J.A. 12. Wells suffers from mixed connective tissue disorder, a debilitating and life-threatening disorder. J.A. 13.

Wells made several requests for reasonable accommodation to permit her to fulfill the essential functions of her position as the Clinic's Bookkeeper. J.A. 14, 15, 79. In April 1997 the Clinic demoted Wells to a receptionist position in an office location several miles from Wells' home, with the knowledge and expectation that Wells would be unable to perform the work at such location and with the purpose of forcing plaintiff to quit. *See* J.A. 77.

When Wells protested the discriminatory transfer, the Clinic's Administrator suggested Wells voluntarily quit by saying at least twice: "So, are you quitting then?" J.A. 80. Because of petitioner's discriminatory treatment, Wells suffered an exacerbation of her medical condition and became unable to work. She consulted her physician, who took her off work *through* May 12, 1997. Wells provided a copy of the medical release to the Clinic. J.A. 80.

Despite the medical release extending *through* May 12, 1997, the Clinic communicated to Wells by letter dated May 6, 1997 that she would be terminated if she did not return to work *by* May 12, 1997, and further provided COBRA forms to Wells containing a termination date of May 12, 1997. J.A. 80-81.

On May 12, 1997, Wells provided the Clinic with an extended medical authorization to be off work. J.A. 81.

Despite such notice, the Clinic terminated Wells' employment, purportedly for her failure to report to work. J.A. 16. Wells could have continued to work with the medical clinic had it provided the reasonable accommodations sought by Wells and had her condition not exacerbated due to the conduct of the Clinic's Administrator. J.A. 82.

Petitioner is a professional corporation. J.A. 12, 21. The five physician shareholders are employees of the corporation, working under employment agreements. J.A. 66, 71. When added to the 13 to 14 employees regularly employed by petitioner other than physicians, the number of employees readily exceeds that required to bring petitioner under coverage of the ADA. J.A. 55-62.

Introduction to the Legal Issues

The Americans with Disabilities Act of 1990 ("the ADA"), 42 U.S.C. § 12112(a), makes it unlawful to discriminate against disabled "employees" or against prospective "employees" who are otherwise qualified for a job. The plain text of the ADA imposes jurisdiction over employers with 15 or more employees. 42 U.S.C. § 12111(5)(A). The ADA is but one of several federal employment laws that confer protections on "employees." For example, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, prohibits discrimination against "employees" on the basis of race, religion, sex or national origin and protects only employees of those employing entities with at least 15 employees. *See also* 29 U.S.C. § 630(b) (Age Discrimination in Employment Act, 20 or more employees). The Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1), prohibits employers from paying differing wages to "employees" on the basis of their sex, and the Family and Medical Leave Act, 29 U.S.C.

§§ 2611(2)-(3), 2617, confers certain rights to take leave on "employees."[1]

The determination of what constitutes an employee, and the distinction between employees, partners, and owners, when such a distinction is relevant, is critical to the applicability of this array of federal employment provisions. Moreover, "[a]ll 50 states, the District of Columbia, and Puerto Rico have adopted in some form laws prohibiting discrimination in employment based on disability." I B. Schlei & P. Grossman, EMPLOYMENT DISCRIMINATION LAW 266 (3d ed. 1996). These state laws also typically apply only to "employees." Resolution of the issue presented in this case has the potential to determine the reach of a vast body of state law.

The Question of What Constitutes an *Employee* Arises in Different Contexts

The question of what constitutes an *employee* for purposes of these remedial statutory protections arises in different contexts. Sometimes, the distinction must be made to determine whether a person performing services for an employing entity is an employee protected by employment discrimination laws versus an independent contractor not enjoying such protection. *See Nationwide Mutual Ins. Co. v. Darden,* 503 U.S. 318, 112 S.Ct. 1344, 117 L.Ed.2d 581 (1992). Similarly, an employing entity may argue that a person performing services, but not

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[1] In general, cases construing definitions of one of the Acts are to be viewed as persuasive authority when interpreting the others. *See Lorillard v. Pons,* 434 U.S. 575, 98 S.Ct. 866, 55 L.Ed.2d 40 (1978).

seeking to invoke the relevant statute, is an independent contractor for the purpose of limiting its number of employees, thereby escaping coverage of the relevant statute for a claim asserted by an undisputed employee.

Other times, when the employing entity is a partnership, the employing entity argues that a person performing services is not an employee but rather is a partner. If a partner, the argument goes, the individual is not an *employee* for purposes of statutory protection. If an admitted employee is claiming the protection of the statute, the partner, it is argued, should not be counted in determining the threshold number of employees for coverage under the Act.

The partner is analogized to an owner, a status inconsistent with that of *employee.* A partner asserting a discrimination claim against the employing entity is said effectively to assert a claim against himself or herself as such an *owner. See, e.g., E.E.O.C. v. Sidley Austin Brown & Wood,* 2002 WL 31387525 *5 (7th Cir. Oct. 24, 2002) ("partnership relations would be poisoned if partners could sue each other for unlawful discrimination"); *Matinchek v. John Alden Life Insurance Co.,* 93 F.3d 96, 101 (3d Cir. 1996) (ERISA, referring to employee acting as an employer threatening to take away his or her own benefits); *Simpson v. Ernst & Young,* 100 F.3d 436, 445 (6th Cir. 1996) (Daughtry, C.J., concurring), *cert. denied,* 520 U.S. 1248 (1997).

In the context of an employing entity formed as a professional corporation, the corporation sometimes argues that its shareholder-employees or director-employees – often lawyers, accountants, physicians, or other professionals – are in "economic reality" partners and as such may not assert a

claim as *employees* under relevant discrimination statutes. *See, e.g., Hyland, M.D. v. New Haven Radiology Associates, P.C.,* 794 F.2d 793 (2d Cir. 1986). Also, as with other forms of employing entities, a professional corporation may argue that its shareholder-employees should be treated as partners to establish that it has an insufficient number of employees for coverage of the relevant employment discrimination law. *See, e.g., E.E.O.C. v. Dowd & Dowd, Ltd.,* 736 F.2d 1177 (7th Cir. 1984).

In each context, then, the question of employee status must be addressed for purposes of determining who can sue as well as who can be sued.

Summary Of Arguments

The Ninth Circuit correctly determined that when an employing entity elects the corporate form of organization, all the corporate entity's employees are *employees* for purposes of determining the number of employees under 42 U.S.C. § 12111(5)(A).

The purpose of imposing a minimum number of employees for ADA coverage is to spare small employers the expense and inconvenience of compliance. When an employing entity has more than the threshold number of participants, whether members or employees, as does the Clinic corporation here, the reason for withholding coverage from small employers no longer holds force.

The statutory language does not permit a conclusion that shareholder employees are anything other than employees. The Clinic and EEOC argue in favor of a model requiring the analysis in virtually every case whether one or more of the shareholder employees is in sufficient

"economic reality" as to be considered a *partner* and thereby an *employer* or *owner* despite his de jure status as an employee of the corporation. Partnerships are the banding together of individual partners. The difference between partnerships and professional corporations is that the corporation has a legal existence separate and apart from its shareholders. Because the Clinic here is not a partnership, but rather a corporation with an independent and distinct legal existence, the inquiry into *partnership* status of the shareholder employees is misplaced.

The Clinic urges the court to ignore the form of business its incorporators and shareholders freely chose. This is not form over substance. The form freely adopted by the employer establishes the substantive nature and rights of the employing entity. *Wells v. Clackamas Gastroenterology Associates, P.C.*, 271 F.3d 903, 905 (9th Cir. 2001). The corporation is a distinct legal entity, different from those who create and own it. The Clinic could have selected a number of other forms of business structure, but elected to form a corporation. Having elected to exist as a corporation, with corporate employees rather than partners, an employing entity such as the Clinic should be held to that election. The shareholder employees of the Clinic work under formal employment agreements with the employing corporation and perform traditional employee duties as part of the Clinic's services to the public. The substance of the form of enterprise selected by the Clinic is that the corporation's servants are substantively employees, even if also shareholders.

Once a business entity elects the corporate form, it undertakes certain obligations, including the duty to observe corporate formalities, file corporate income taxes, and otherwise act as a corporation. Having freely chosen

the corporate form, the employing entity is the corporation, and the corporation's employees cannot be other than employees under the relevant statutory language. As such, they are employees for purposes of ADA coverage for Wells' claims against the Clinic.

The Ninth Circuit correctly determined that when an employing entity elects the corporate form of organization, all the corporate entity's employees are *employees* for purposes of determining the number of employees under 42 U.S.C. § 12111(5)(A). The dissenting judge below argues that under the majority holding two medical clinics, identical in size in every respect, would be treated differently for ADA Title I coverage because of business form. If that is so, it is exactly why this Court should hold that employees of professional corporations are, in substance and in form, employees of the employing corporate entity, thereby providing clear guidance to small firms about the potential effect of electing the advantages of the corporate form of organization.

The position of the dissenting judge below, and of the United States and the Equal Employment Opportunity Commission, results unnecessarily in the exclusion from protection of individuals especially vulnerable to the kinds of discriminatory practices the federal employment statutes were designed to prevent. The EEOC focuses on "whether the individual acts independently and participates in managing the organization, or whether the individual is subject to the organization's control." Adoption of this test will cause an explosion in arguments that one or more individuals within the defendant employing entity has some independence and role in managing the organization, and thereby should be excluded from a status as "employee" under the Act. The application of an

economic realities test to an ever widening range of shareholders and possibly others with some degree of management responsibility, as the EEOC's position will permit, will engender the need to apply an economic realities case in all but the clearest cases, imposing upon the already overburdened district courts an added burden.[2]

This Court should adopt an analytical model that takes into account the purpose for which bona fide *partners* are excluded from protection of federal employment statutes, yet operates to *include* rather than *exclude* those persons who are, without serious question, *employees*. This can be done by focusing on which specific part of the statutory definition is at issue at any given time, and resolving employee status accordingly.

Employers are best served by a test that gives them a ready benchmark for their obligations relating to federal employment statutes, without resort to complex legal analysis of facts and to the different possible interpretations which may be placed on them. Such predictability results from a test that addresses first and primarily whether the question of employee status arises in connection with a claim asserted by an admitted employee. If so, then the question is merely how many employees (including shareholders and any others with ownership interests) does the employing entity employ. If that number satisfies the requisite number of employees for application of the

[2] Defendants may attempt to pick and choose from among employees on the payroll, challenging their status, their days of earning pay, and whether they own shares in the corporate stock, and even arguing that an individual is an employee for one purpose and an employer for another.

relevant federal employment statute, then the employer will know that it must comply with the obligations imposed by the relevant statute.

ARGUMENT

I. THE DECISION TO INCORPORATE MEANS THAT ALL EMPLOYEES OF THE CORPORATION, REGARDLESS OF SHAREHOLDER STATUS, ARE "EMPLOYEES" FOR PURPOSES OF DETERMINING THE CORPORATION'S SUBJECTIVITY TO SUIT AS AN *EMPLOYER*

A. The Clinic's Shareholder-Employees are Employees, not Partners

The Ninth Circuit properly concluded that the statutory language requires consideration of the number of employees, not whether or not those employees might have some attributes of partners. J.A. 101. The statutory language does not permit a conclusion that shareholder employees are anything other than employees, particularly when applied in the context of an admitted employee seeking to bring a claim against the employing entity.

In *Hyland, M.D. v. New Haven Radiology Associates, P.C.*, 794 F.2d 793 (2nd Cir. 1986) (ADEA case), the court wrote:

> The fact that certain modern partnerships and corporations are practically indistinguishable in structure and operation, however, is not reason for ignoring a form of business organization freely chosen and established. * * * Having made the election to incorporate, [the physician members of NHRA] should not now be heard to

> say that their corporation is 'essentially a medical partnership among co-equal radiologists.'
>
> It is one thing to apply an economic realities test to distinguish an employee from an independent contractor or partner, but it is quite another to apply the test in an attempt to identify as partner one associated with a corporate enterprise. While those who own shares in a corporation may or may not be employees, they cannot under any circumstances be partners in the same enterprise because the roles are mutually exclusive.

Id. 794 F.2d at 798. *Accord Gorman v. North Pittsburgh Oral Surgery Associates, Ltd.,* 664 F. Supp. 212, 214 (W.D. PA. 1987) ("The professional corporation enjoys a unique existence among business combines, being a corporation for liability and tax purposes but a partnership in other respects. *It enables a professional to employ him or herself and that is the only economic reality with which we need be concerned.* We hold that the shareholders of NPOSA are employees of the professional corporation for ADEA purposes." (Emphasis supplied)); *see also E.E.O.C. v. Johnson & Higgins, Inc.,* 91 F.3d 1529 (2d Cir. 1996).[3]

It is undisputed that the five physicians associated with petitioner are employees, working under employment

[3] Shrewd decisions of the form of business entity require sophisticated analyses of the costs and benefits involved. These differences are like any business decision – economic in nature. The dissent below equates the minimum employee requirement as economic in nature. As such, the form of entity is of proper consideration when assessing liability.

agreements. When added to the 13 to 14 employees otherwise admitted by the medical clinic, the number of employees readily exceeds that required to bring petitioner under coverage of the ADA.

B. Corporations, Unlike Partnerships, Exist Separate and Apart from Shareholders

The plain text of the ADA imposes jurisdiction over employers with 15 or more employees. 42 U.S.C. § 12111(5)(A). The Clinic argues the Court should examine whether the corporate shareholder-employees here should be treated not as employees, as they necessarily are, but rather as if they were *not employees* at all. The Clinic's analysis relies on cases involving partners and excluding partners from the number of an employing entity's employees. In the context of a corporation, such analysis is inappropriate.

It has generally been accepted that the employment discrimination laws cover "employees" only and exclude bona fide partners. The common reasoning for excluding partners is that partners are co-owners of a business who are jointly engaged in an entrepreneurial venture. The federal employment laws were not intended as a vehicle for co-owners to resolve disputes over how to conduct their business. *See, e.g., Sidley Austin Brown & Wood,* 2002 WL 31387525 at *5; *Matinchek,* 93 F.3d at 101; *Simpson,* 100 F.3d at 445 (Daughtry, C.J., concurring).

In *Hishon v. King & Spaulding,* 467 U.S. 69, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984), this Court considered a Title VII claim of sex discrimination brought by an associate of a law firm organized as a partnership. The Court noted that the plaintiff's complaint sufficiently alleged that the

partnership employing entity was an employer for purposes of Title VII. Once the partnership entered into "a contractual relationship of employment" with the plaintiff, the protections of Title VII attached. *Id.* at 74.

In his concurring opinion in *Hishon,* Justice Powell took pains to express his understanding that the Court's opinion did not extend the protections of Title VII "to the management of a law firm by its partners." *Id.* at 79. Justice Powell emphasized that the Court's opinion did not "require that the relationship among partners be characterized as an 'employment' relationship to which Title VII would apply." *Id.*

> The relationship among law partners differs markedly from that between employer and employee – including that between the partnership and its associates. The judgmental and sensitive decisions that must be made among the partners embrace a wide range of subjects. The essence of the law partnership is the common conduct of a shared enterprise. The relationship among law partners contemplates that decisions important to the partnership normally will be made by common agreement or consent among the partners.

Id. at 80 (Powell, J., concurring) (footnotes and citation omitted).

In a footnote to the passage quoted just above, Justice Powell described the "sensitive decisions" required of the partners:

> These decisions concern such matters as participation in profits and other types of compensation; work assignments; approval of commitments in bar association, civic, or political activities; questions of

> billing; acceptance of new clients; questions of conflicts of interest; retirement programs; and expansion policies. Such decisions may affect each partner of the firm. Divisions of partnership profits, ***unlike shareholders' rights to dividends,*** involve judgments as to each partner's contribution to the reputation and success of the firm. This is true whether the partner's participation in profits is measured in terms of points or percentages, combinations of salaries and points, salaries and bonuses, and possibly in other ways.

Id. at 80 n.3 (Powell, J., concurring) (emphasis supplied).[4]

The Seventh Circuit interpreted Justice Powell's comments in *Hishon* as "saying that a traditional law partnership, involving 'the common conduct of a shared enterprise' and a relationship among the partners that 'contemplates that decisions will be made by common agreement or consent among the partners,' has a governance structure different from the one contemplated or assumed by Title VII." *E.E.O.C. v. Sidley Austin Brown & Wood,* 2002 WL 31387525 at *9. That court explained further that "[a]t the same time he was making clear that labeling an enterprise that does not have the structure, the character, of the traditional partnership will not immunize it from the statute." *Id.*

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[4] Justice Powell is not the only one to expressly compare, in this context, the corporate structure as different from a partnership. *See, e.g., Trainor v. Apollo Metal Specialties Inc.,* ___ F.3d ___, 2002 WL 31781136 (10th Cir. Dec. 13, 2002); *Hishon v. King & Spaulding,* 678 F.2d 1022, 1028 (11th Cir. 1982) (emphasis supplied), *reversed on other grounds,* 467 U.S. 69, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984).

Partnerships are the banding together of individual partners. A partnership is generally said to be created when persons join together their money, goods, labor, or skill for the purpose of carrying on a trade, profession, or business and when there is community of interest in the profits and losses." *Commissioner of Internal Revenue v. Tower,* 327 U.S. 280, 286, 66 S.Ct. 532, 535, 90 L.Ed. 670 (1946); *Commissioner of Internal Revenue v. Culbertson,* 337 U.S. 733, 740, 69 S.Ct. 1210, 93 L.Ed. 1659 (1949). Similarly, section 6 of the Uniform Partnership Act defines a partnership as "an association of two or more persons to carry on as co-owners a business for profit."[5]

The critical difference between partnerships and professional corporations is that the corporation has a legal existence separate and apart from its shareholders. Because the Clinic here is not a partnership, but rather a corporation with an independent and distinct legal existence,

[5] In *Serapion v. Martinez,* 119 F.3d 982 (1st Cir. 1997), the First Circuit rejected the argument that all individual partners were employees of the partnership under Puerto Rico law:

> We also reject a variation on the *per se* theme advanced by the appellant. She asseverates that, due to the peculiarities of Puerto Rico's civil law structure, all partners in all Puerto Rico partnerships must be considered employees for purposes of Title VII. In a civil law system, this theory goes, a partnership is not merely a banding together of individual partners but a separate entity which must itself be considered the employer of all the individual partners.

Id. at 988. The *Serapion* court did not resolve the question under Puerto Rico law, instead concluding that it was "enough for our purposes that the construct is unsound as a matter of *federal* law * * * *: [W]hether an individual is an employee for purposes of Title VII is a matter of federal law, and the question must be answered with reference to principles of federal law."

the effort to focus on the *partnership* status of the shareholder employees is misplaced.

C. The Corporation Medical Clinic is not a Partnership and The Corporate Form of Business Structure Selected by the Clinic Should Not be Ignored

When *partners* are the subject of examination, the question is different from that presented in this case. Partners typically are not employees of the partnership. In contrast, corporate employees, even if shareholders, necessarily *are* employees of the corporation.[6]

The Tenth Circuit recently addressed the employee status of one of two equal shareholders of the employing entity, virtually the same issue now before the Court in this matter. *Trainor v. Apollo Metal Specialties Inc.,* ___ F.3d ___, 2002 WL 31781136 (10th Cir. Dec 13, 2002). In *Trainor,* the district court granted summary judgment to the employer, holding it was not appropriate to classify the

[6] Arguing that shareholder employees should be treated as if they were partners might have some logical force if one of these employee-shareholders were here attempting to sue the corporate entity. In such a case, in a closely held corporation, an action by an owner against himself or herself could create certain difficulties. But even in such a case, shareholder disputes with the corporate entity arise in a variety of circumstances, such as in contract disputes, compensation issues, and other claims. *See generally E.E.O.C. v. Pettigrove Truck Service, Inc.,* 716 F. Supp. 1430 (S.D. FL. 1989).

The courts are competent to resolve these issues. Whatever difficulties might exist in subjecting a corporation to suit by an employee-shareholder are insufficient to ignore the plain text of the Act in its reference to "employees," particularly when those difficulties are not involved at all in an action by this plaintiff, a lower-level employee.

50% shareholder, a Mr. Pilgrim, as both an owner and an employee. In reversing the district court, the Circuit Court first recognized the remedial purposes of federal employment statutes:

> "In our review of the antidiscrimination laws we must be mindful of their remedial purposes, and liberally interpret their provisions to that end." Wheeler v. Hurdman, 825 F.2d 257, 262 (10th Cir. 1987). "Such liberal construction is also to be given to the definition of 'employer,'" Owens v. Rush, 636 F.2d 283, 287 (10th Cir. 1980) (internal quotation omitted), and the term "employee," see Chavero v. Local 241, 787 F.2d 1154, 1156 (7th Cir. 1986) (per curiam).

Id. at *5.

Examining the employee status of the 50% shareholder, the court explained "Mr. Pilgrim and his wife currently own in equal shares all the stock of Apollo[;] Mr. Pilgrim performed services for Apollo[;] and * * * Apollo [the employing entity] paid him a salary for those services. *Mr. Pilgrim was thus both an owner of Apollo and a participant in a traditional employment relationship with the corporation.*" *Id.* at *6 (emphasis supplied).

The circuit court examined *Serapion v. Martinez,* 119 F.3d 982 (1st Cir. 1997), where the court concluded that a senior or proprietary partner was not an employee of the partnership, noting the factual analysis that court applied to determine whether a putative partner actually was sufficiently close to an employee to be covered by Title VII. The *Trainor* court concluded that even if the factors examined in *Serapion* were possibly relevant to evaluating whether a corporate shareholder should also be considered an employee, "the differences between a shareholder of a

corporation and a partner in a partnership * * * may well compel a different result when the relevant factors are assessed." *Trainor,* 2002 WL 31781136 at *5.

The *Trainor* court distinguished *Chavero v. Local 241,* 787 F.2d 1154, 1156 (7th Cir. 1986) (per curiam), where the court held that the members of the union's executive board of directors were not union *employees* for purposes of Title VII coverage. It recognized that "the term 'employee' does not include persons 'who are no more than directors of a corporation or unpaid, inactive officers.'" *Trainor,* 2002 WL 31781136 at *6. The court continued in describing the *Chavero* result: "Nevertheless, the court took care to point out that a director 'may accept duties that make him also an employee,' and that 'the primary consideration is whether an employer-employee relationship exists.'" *Trainor,* 2002 WL 31781136 at *6. "To the extent that *Chavero* is relevant, therefore, it supports the conclusion that Mr. Pilgrim is an Apollo employee because he performs traditional employee duties as part of an employment relationship." *Id.*

The same conclusion obtains here. The shareholder employees of the Clinic work under formal employment agreements with the employing corporation and perform traditional employee duties as part of the Clinic's services to the public. As such, they are employees for purposes of ADA coverage for Wells' claims against the Clinic.

The *Trainor* court concluded that "partnerships are not analogous to corporations." In evaluating shareholder employee status, as with director employees, "[T]he

primary consideration is whether an employer-employee relationship exists" in which the director "perform[s] traditional employee duties."[7] Although "it may be true that Mr. Pilgrim did not answer to anyone but himself in performing his services for Apollo, we do not think this factor is dispositive in light of the undisputed evidence of his employment relationship with the company." *Id.* 2002 WL 31781136 at *9.

[7] The *Trainor* court also considered the following:

"[T]he primary consideration is whether an employer-employee relationship exists" in which the director "perform[s] traditional employee duties." *Chavero,* 787 F.2d at 1157; *Walters v. Metro. Educ. Enter., Inc.,* 519 U.S. 202, 212 (1997) ("the ultimate touchstone under § 2000e(b) is whether an employer has employment relationships with 15 or more individuals"); *see also Whitaker House Coop.,* 366 U.S. at 32 (members in cooperative are also employees when cooperative provided opportunity to work and paid for it); *Graves v. Women's Prof. Rodeo Ass'n,* 907 F.2d 71, 72-73 (8th Cir. 1990) (members of corporation not employees because they did not receive compensation for services and therefore did not have employment relationship with corporation); *Zimmerman v. N. Am. Signal Co.,* 704 F.2d 347, 351-52 (7th Cir. 1983) (corporate officers who were paid for their services and worked for corporation deemed employees, while officers who were unpaid and took no role in corporate daily affairs were not considered employees), *overruled on other grounds by Walters v. Metro. Educ. Enter., Inc.,* 519 U.S. 202 (1997); *E.E.O.C. v. First Catholic Slovak Ladies Ass'n,* 694 F.2d 1068, 1070 (6th Cir. 1982) (association directors were also employees when they performed traditional employee duties and drew salaries)."

Trainor v. Apollo Metal Specialties Inc., ___ F.3d ___, 2002 WL 31781136 •9 (10th Cir. Dec. 13, 2002).

Reasoning that partners are not employees, the Eleventh Circuit distinguished employees of a corporation as different and distinct from partners:

> [T]he partners own the partnership; they are not its 'employees' under Title VII. ***We find a clear distinction between employees of a corporation and partners of a law firm.*** In making this distinction, we do not presume to exalt form over substance. In this instance, however, the form is the substance, and we are unwilling to dictate partnership decisions under the guise of employee promotions protected by Title VII. The very essence of a partnership is the voluntary joinder of all partners with each other.

Hishon v. King & Spaulding, 678 F.2d 1022, 1028 (11th Cir. 1982) (emphasis supplied), *reversed on other grounds,* 467 U.S. 69, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984).

II. THE DISSENT BELOW OFFERS NO COMPELLING RATIONALE FOR AN ECONOMIC REALITIES TEST

The dissenting judge below cautions against embracing the word *corporation* as the end of the inquiry. Instead, she urges that the correct approach is to examine the relationships of shareholders with their clientele. In doing so, the dissenting judge notes that under Oregon law physician shareholders are jointly and severally liable to their clientele, similar to a partnership, and unlike a corporation. As such, she concludes, shareholders of professional corporations should be considered more like partners. J.A. 107.

The dissenting judge's summary is limited in scope and incomplete. The case at hand does *not* concern the

relationship of the shareholder employees to the professional services rendered; it examines how an employer treats its employees. The dissent's examination of state law is not particularly helpful if, as the court held in *Serapion,* the question whether an individual is an employee for purposes of the federal employment statutes is a matter of federal, not state, law. 119 F.3d at 988-89.

Even if state law is relevant, a more complete examination of the professional corporation and partnership forms of business demonstrates significant differences between the two. While shareholders of a professional corporation are jointly and severally liable for acts rendered in the specified professional service of the corporation, they are *not jointly and severally liable* for acts not so associated. Ore. Rev. Stat. § 58.185. Partners are liable, jointly and severally, for all obligations of the partnerships, including employment agreements. Ore. Rev. Stat. § 67.105.

Other significant differences that enter into the decision of which entity to form include formation, duties, and dissolution. The Oregon Business Corporation Act applies to professional corporations where it does not conflict with the professional corporation Act. Ore. Rev. Stat. § 58.045. Like any corporation, professional corporations are required to file papers with the Secretary of State, conduct regular meetings, have a board of directors, submit articles of incorporation, and distribute shares. *See* Ore. Rev. Stat. § 60.100-60.992. Oregon courts are authorized to take significant actions against the board of directors

when a suit is brought by a shareholder.[5] These actions include prohibiting, or setting aside, any action of the corporation, removing a director from office, appointing an individual as a director or officer, demanding an accounting with respect to the matter in dispute, and issuing distributions of shares. Ore. Rev. Stat. § 60.952.

Partnerships do not operate under such formalities. A partnership is created when two or more persons agree to carry on as co-owners a business for profit whether or not the persons intend to create the partnership; no filing is necessary. Ore. Rev. Stat. § 67.055. Partnerships are not required to have a structured board of directors or conduct regular meetings.

Whereas shareholders of a professional corporation may sell their shares, or indeed their entire interest, a partner may freely transfer only the partner's share of profits, losses, and distributions. Ore. Rev. Stat. § 67.195. A partner may dissociate from a partnership, but may be liable for damages caused by a wrongful dissociation. Ore. Rev. Stat. § 67.225. Finally, partners owe a duty of loyalty and a duty of care to the partnership. Ore. Rev. Stat. § 67.155.

The dissent also refers to the reasoning behind Title I's fifteen employee coverage requirement as imposed to spare small firms like medical practice groups from the expense of the employment anti-discrimination laws.

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[5] Professional corporations may have shareholders that are not professionals. "The holders of a majority of each class of shares entitled to vote shall be physicians who are licensed in this state to practice medicine." Ore. Rev. Stat. § 58.375.

Under the majority holding, she argues, two medical clinics, identical in size in every respect, would be treated differently for ADA Title I coverage because of business form. J.A. 107.

That may be so, but that is exactly why this Court should hold that employees of professional corporations are, in substance and in form, employees of the employing corporate entity, thereby providing clear guidance to small firms about the potential effect of electing the advantages of the corporate form of organization. Such an election carries both benefits and obligations, and an incorporating employing entity should not expect to have one without the other.

III. PETITIONER SHOULD BE HELD TO ITS ELECTION TO INCORPORATE

The Clinic urges the court to ignore the form of business its incorporators and shareholders freely chose. This is not a "form over substance" problem. The substance of the form of enterprise selected by the Clinic is that the corporation's servants are substantively employees, even if also shareholders.[9]

[9] Some courts have focused upon the conflict that arises when shareholders or partners bring a claim against the employing entity, within which they may or do exert decision-making authority and in which they may or do have a direct stake in the financial impact a successful claim could cause. Those cases raise different analytical problems, as do cases involving the distinction between employees and independent contractors. It is one thing to determine that an owner of a business entity should be precluded from suing the entity he or she owns. It is yet another to determine that a lower level employee should

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The corporation is "a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who create it, who own it, or whom it employs." *Cedric Kushner Promotions v. King,* 533 U.S. 158, 163, 121 S.Ct. 2087, 150 L.Ed.2d 198 (2001). The Clinic could have selected a number of other forms of business structure, but elected to form a corporation. The Clinic could have elected the partnership model, but did not. It elected instead to become a corporation, which under the law is a separate and distinct legal entity. *Trustees of Dartmouth College v. Woodward,* 4 Wheat. 518, 17 U.S. 518, 636, 4 L.Ed. 629 (1819).

Having elected to exist as a corporation, with corporate employees rather than partners, an employing entity such as the Clinic should be held to that election. As the Ninth Circuit's Opinion below stated:

> Given the broad purpose of the ADA, see 42 U.S.C. § 12101, we find Hyland's reasoning to be considerably more persuasive than Dowd's. Because the decision to incorporate is presumably a voluntary one, there is no reason to permit a professional corporation to secure the "best of both possible worlds" by allowing it both to assert its corporate status in order to reap the tax and civil liability advantages and to argue that it is like a partnership in order to avoid liability for unlawful employment discrimination.

be deprived the protection of employment discrimination laws by excluding shareholders who have affirmatively elected to be employees of their professional corporation.

Wells v. Clackamas Gastroenterology Associates, P.C., 271 F.3d at 905.

Indeed, "There is nothing inherently inconsistent between the coexistence of a proprietary and an employment relationship." *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. 28, 32, 81 S.Ct. 933, 936, 6 L.Ed.2d 100 (1961) (shareholders in knitwear cooperative held to be employees under FLSA).[10] Under the Restatement (Second) of Agency:

> [F]ully employed but highly placed employees of a corporation, such as presidents and general managers, are not less servants because they are not controlled in their day-to-day work by other human beings. Their physical activities are controlled by their sense of obligation to devote their time and energies to the interests of the enterprise.

Id., ch. 7, topic 2, title B, introductory note at 479. Indeed, "A corporation and its shareholders are presumed separate

[10] In a variety of situations applying a remedial statute calling for the interpretation of the term "employee," an individual's status as a major stockholder, officer or director of a corporation has been found to be compatible with his or her status as an employee. *See, e.g., Zimmerman v. North American Signal Co.*, 704 F.2d 347, 350-54 (7th Cir. 1983) (ADEA plaintiff, a corporate vice president and one-third shareholder, considered as employee); *E.E.O.C. v. First Catholic Slovak Ladies Association*, 694 F.2d 1068, 1070 (6th Cir. 1982) (officer-directors held entitled to ADEA protections); *Novotny v. Great American Federal Savings & Loan Association*, 584 F.2d 1235, 1261 (3d Cir. 1978) (person holding positions of secretary and director held an employee for Title VII purposes), *vacated on other grounds*, 442 U.S. 366, 99 S.Ct. 2345, 60 L.Ed.2d 957 (1979); *Hoy v. Progress Pattern Co.*, 217 F.2d 701, 704 (6th Cir. 1954) (one-eighth shareholder, vice president, director and chairman of board may be employee within purview of FLSA).

and distinct, whether the corporation has many shareholders or only one." I W. Fletcher, Cyclopedia of the Law of Private Corporations § 14 at 432 (rev. ed. 1999).

Nonetheless, the Clinic urges this Court to ignore the form of business it freely chose. The Ninth Circuit was correct in deciding that a corporation is a corporation. The statutory language of the ADA does not speak to "economic realities" but rather to "employees." Corporate employees are just that, not partners. *See Hyland, M.D.* at 798 ("There is no need to develop such a list of factors [to be considered in determining if an individual is a 'partner' or a covered 'employee'] where the individual involved is a corporate employee, for we hold that every such employee is 'covered' for purposes of the ADEA and that any inquiry respecting partnership status would be irrelevant.")

Putting taxation issues aside, four factors typically affect the choice of business form: extent of liability, centralization of management, continuity of life, and transferability of interest. Klein, W.A., et al. AGENCY, PARTNERSHIPS, AND LIMITED LIABILITY ENTITIES, Foundation Press 2001 (hereinafter cited as Klein, AGENCY, PARTNERSHIPS, AND LIMITED LIABILITY ENTITIES). Before the 1960s inception of professional corporations, physicians wishing to practice in small organizations could do so through a general partnership. In the 1960s, states began allowing professionals (primarily physicians) to form PCs, saving incorporated professionals significant taxation on employee retirement plans. Eaton, B.C., BUSINESS ORGANIZATIONS: PROFESSIONAL CORPORATIONS AND ASSOCIATIONS, Volume 17-17F. Matthew Bender 1998.

Whereas general partnerships did not allow for limited liability, centralization of management, continuity

of life, or free transferability of ownership, a corporation provided those features, plus the favorable taxation status. In the 1990s, states began adopting LLC and LLP statutes, allowing professionals to obtain the advantageous "pass through taxation" of partnership while maintaining limited liability for acts of other professionals in their practice.

LLCs and LLPs have attributes once exclusive to the partnership or corporate form. As a general matter, they enjoy pass-through taxation (like a partnership), limited liability for the actions of other professionals (like a corporation), centralization of management (like a corporation), continuity of life (like a corporation), and transferability of interest (like a corporation). Klein, AGENCY, PARTNERSHIPS, AND LIMITED LIABILITY ENTITIES.

The Clinic elected to operate as a corporation, rather than as a partnership. It did so for a reason. It did so because it wanted the benefits flowing from the corporate structure. It now must accept the obligations as well.

IV. THE POSITION OF THE UNITED STATES AND EEOC ENGENDERS INCREASED LITIGATION, UNCERTAINTY AND EXCLUSION OF INDIVIDUALS SUFFERING FROM DISCRIMINATORY TREATMENT

A. The Purpose of the ADA & Other Remedial Legislation

The purposes of the ADA are four-fold: to eliminate discrimination against persons with disabilities, to set enforceable standards for disability discrimination, to establish the federal government's role in enforcing the Act, and to use Congressional authority to address disability

discrimination. 42 U.S.C. § 12101(b), § 12111(4), (5), § 12112(a) (1994).

Where the plain language of ADA Title I is ambiguous, the Congressional reasoning behind the Act's passage becomes more relevant, and courts should strive to effectuate the purpose of the ADA, including where relevant in connection with the question of coverage. The purpose of imposing a minimum number of employees for ADA coverage is to spare small employers the expense and inconvenience of compliance. *See Papa v. Katy Indus., Inc.*, 166 F.3d 937, 940 (7th Cir.), *cert. denied*, 528 U.S. 1019 (1999). When an employing entity has more than the threshold number of participants, whether members or employees, as does the Clinic corporation here, the reason for withholding coverage from small employers no longer holds force. Surely a partnership of 25 partners and 14 employees would be in a much better position to comply with the ADA's requirements than a sole proprietor with 15 employees. Accordingly, for purposes of satisfying the underlying purpose of the minimum number of employees for coverage, the question whether a particular partner or shareholder is or is not more like an "owner" has no application.

A coverage approach that prevents employers from avoiding compliance and liability solely by a nominal choice of business form effectuates the inclusive purposes of the ADA. In contrast, the coverage approach adopted by some of the circuits, such as the Seventh Circuit in *E.E.O.C. v. Dowd & Dowd, Ltd.*, 736 F.2d 1177 (7th Cir. 1984), where the corporate structure can be disregarded to avoid coverage, distorts the goals of the Act. The danger that transparent economic distinctions might frustrate the ADA's employment purpose requires a resolution of the

question presented by this Court that increases, rather than restricts, those persons properly covered by the employment provisions of ADA Title I and other employment anti-discrimination statutes.

B. The Position of the United States and EEOC Leads to Exclusion of Individuals Properly Protected by the Act

The position of the United States and the Equal Employment Opportunity Commission (referred to collectively as the "EEOC") also results unnecessarily in the exclusion from protection of individuals especially vulnerable to the kinds of discriminatory practices the federal employment statutes were designed to prevent. The EEOC's approach does not further the ADA's protective function, but rather restricts it. The EEOC admits its approach excludes persons from protection, which it attempts to justify by referring to them as individuals least vulnerable to such discrimination. Brief of Amicus Curiae United States and the Equal Employment Opportunity Commission ("the EEOC's Brief") at 6, 11.

The EEOC supports its willingness to exclude individuals from protection of the ADA by providing as an example an extreme scenario involving "the president, sole director, and sole shareholder of a corporation" on the one hand, and a shareholder employee who is "supervised in his work, reports to someone higher in the organization, and has little influence on the terms and conditions under which he works" on the other hand. EEOC's Brief at 11. The EEOC argues that its test would exclude the first from the definition of employer, but include the second.

Application of the EEOC's approach invites uncertainty and increased litigation because fewer cases will occur within the extremes identified by the EEOC. How often would the "president, sole director, and sole shareholder of the corporation" wish to bring a discrimination claim against the employing entity? Arguing that classifying such a person as an employee (even when in fact performing employee duties for the employing entity) would be inconsistent with the Act ignores the fact that he or she is in fact, as a matter of corporation law, an employee of the corporation.

What the EEOC fails to recognize is that the effect of excluding the first very well may have the effect of causing a lower level employee to have no protection whatsoever. The comparison between the company president shareholder and lower level shareholder employee, when neither is the one to seek protection of the Act, misses the point and demonstrates the failure of the EEOC test to support the *inclusion* of persons subject to discrimination. Indeed, when determining whether the employing entity is of sufficient size to permit an employee (including a shareholder employee) to claim the protection of the Act, the test proposed here by Wells is more consistent with "'a primary purpose of the antiretaliation provisions: [m]aintaining unfettered access to statutory remedial mechanisms.'" EEOC's Brief at 12 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997)).

The EEOC focuses on "whether the individual acts independently and participates in managing the organization, or whether the individual is subject to the organization's control." EEOC Compliance Manual (BNA) § 2, at 605:0009 (2002), quoted in EEOC's Brief at 8. This test will invite an argument in a wide range of cases that one

or more individuals within the defendant employing entity has some independence and role in managing the organization, and thereby should be excluded from a status as "employee" under the Act.

Contrary to the EEOC's assertion, subjecting more and more individuals to examination based on an economic realities test fails to further the Act's "overriding protective function." EEOC's Brief at 12. The application of an economic realities test to an ever-widening range of shareholders and possibly others with some degree of management responsibility – as the EEOC's position will permit – will engender the need to apply an economic realities test in all but the clearest cases. The overburdened district courts likely do not have the resources to accommodate the explosion of defenses asserted on this basis.

The EEOC attempts to bolster its position by pointing out that its test is similar to the economic realities test already applied by the courts in determining whether a titular partner is a bona fide partner, such that he or she should be excluded from coverage of the Act. But application of an economic realities test in such a circumstance is not precluded by the test advocated by Wells here; to the contrary, she supports it when the employing entity is a partnership. When the question is whether a partner in name is in actuality an employee of the partnership, an economic realities test will operate to *include* such an individual under the protection of the Act.[11]

---

[11] The EEOC's Brief states:

> [T]he tendency in some * * * cases is to ask only whether professional corporations are analogous to partnerships or

(Continued on following page)

V. THE ECONOMIC REALITIES TEST REQUIRES THE COURTS TO ENGAGE IN UNNECESSARY COMPLEX & EXPENSIVE FACTUAL INQUIRIES

The use of an economic realities test for cases involving anything other than putative partners is not necessary. Such a subjective test is time consuming for the parties involved and for the courts. The inquiry is highly fact-dependent, requiring intensive evaluation and analysis. *See Walters v. Metropolitan Educational Enterprises,* 519 U.S. 202, 211, 117 S.Ct. 660, 136 L.Ed.2d 644 (1997) (rejecting definition of "employee" that would make Title VII's coverage depend upon an "incredibly complex and expensive factual inquiry"); *id.* at 664 (stating that "Congress should be thought to have prescribed" an approach to the jurisdictional issue that is "impossible to administer" "only if the language could bear no other meaning").

As the Tenth Circuit explained in rejecting a similar multi-factor test:

> whether shareholder-directors are analogous to partners as if the answer to those questions automatically resolves the question whether particular shareholder-directors are employees. The tendency of that approach is to transform every professional corporation, by operation of law, into a de facto partnership, and every shareholder, without regard to circumstance, into a non-employee partner.
>
> * * * The ADA does not exclude partners from its definition of employees, so a finding that a shareholder-director should be regarded as a partner does not answer the ultimate statutory question.

EEOC's Brief at 22-23 (citations omitted). Wells agrees with this aspect of the EEOC's Brief. *See also* Restatement (Second) of Agency § 14 & comment a at 62 ("When one of the partners is * * * regularly employed in the business, he is a servant of the partnership.")

> A potentially chaotic situation is presented with partners drifting into and out of covered "employee" status, remaining partners all the while, with no one ever quite knowing who is an employee/partner and who is a 'pure' partner.

Wheeler v. Main Hurdman, 825 F.2d 257, 274 (10th Cir.), *cert. denied*, 484 U.S. 986, 108 S.Ct. 503, 98 L.Ed.2d 501 (1987).

This Court also has rejected a multi-factor test on the basis that such a test would lead to a lack of predictability and an inability of companies to determine who was and was not an employee. This Court's decision in *Nationwide Mutual Ins. Co. v. Darden,* 503 U.S. 318, 112 S.Ct. 1344, 117 L.Ed.2d 581 (1992), adopted a common law test for distinguishing employees from independent contractors under ERISA. The *Darden* test remains useful when determining the existence of an employee relationship under common law, though the relevant factors provide little guidance "for drawing lines between people who are part of the same enterprise." *Wheeler,* 825 F.2d at 272; *accord Devine v. Stone, Leyton & Gershman, P.C.,* 100 F.3d 78, 81 n.4 (8th Cir. 1996).

In addition, the test outlined in *Darden* involved reference to a number of relatively straightforward objective factors, many of which were subject to ready determination – for example, whether the worker in question provided his own tools, the location of the work, the duration of the employment relationship, the method of payment, and the tax treatment of the hired party. 503 U.S. at 323, 327. Indeed, this Court expressly rejected an alternative approach that included consideration of the worker's "economic bargaining position" vis-a-vis the employer because it would "severely compromise the capacity

of companies * * * to figure out who their 'employees' are and what, by extension, their pension-fund obligations will be." *Id.* at 327.

The same concerns over predictability and an inability to determine in advance a company's rights and obligations under the federal employment statutes are present here. Employers are best served by a test that gives them a ready benchmark for their obligations relating to federal employment statutes, without resort to complex legal analysis of facts and to the different possible interpretations which may be placed on them.

Such predictability results from a test that addresses first and primarily whether the question of employee status arises in connection with a claim asserted by an admitted employee. If so, then the question is merely how many employees (including shareholders and any others with ownership interests) does the employing entity employ. If that number satisfies the requisite number of employees for application of the relevant federal employment statute, then the employer will know that it must comply with the obligations imposed by the relevant statute.

Such a model, superior to the imposition of an unpredictable economic realities test, would lend itself to simplified application in most cases. The difficult factual inquiries – right to control, degree of management responsibility, supposed ability to influence the employing entity, potential roles in firm governance, and the like, *see* EEOC Compliance Manual (BNA) at 605:0009 (2002); *Serapion,* 119 F.3d at 989-90 – involved in determining the bona fide nature of a titular "partner" for purposes of determining such a "partner's" right to claim protection under the

relevant Act, can be avoided. The following section proposes such a model.

VI. THE APPROPRIATE ANALYTICAL MODEL EXAMINES THE SPECIFIC PART OF THE STATUTORY DEFINITION AT ISSUE, AND RESOLVES EMPLOYEE STATUS ACCORDINGLY

A. Statement of the Model

When considering concepts of ownership, where the danger exists of having a partner's share of profits potentially conditioned upon the outcome of claims, suits and obligations generated by another partner, *see Wheeler,* 825 F.2d at 274, questions of who among the partners should be considered owners can have significant impact. On the other hand, when considering only whether an employing entity is subject to claims involving federal employment discrimination, which particular partner (or shareholder) is or is not an *owner* has little significance.

This Court should adopt an analytical model that takes into account the purpose for which bona fide *partners* are excluded from protection of federal employment statutes, yet operates to *include* rather than *exclude* those persons who are, without serious question, *employees.* This can be done by focusing on which specific part of the statutory definition is at issue at any given time, and resolving employee status accordingly.

B. The Statutory Language is not Meaningless or "Circular": An Employee is an Individual Employed by an Employer and a Bona Fide Partner is an Owner, While a Corporate Employee is an Employee

The relevant statutory definition from Title I of the ADA prohibits entities covered by the Act from discriminating against a qualified job applicant or employee with a disability because of such disability. An employer, one of the entities covered by the Act, is defined as an entity engaged in industry affecting commerce with fifteen or more employees working twenty or more weeks in the current or preceding year. An employee is defined as "an individual employed by an employer." The statutory definition of employee under several employment related statutes is virtually identical, *See* 42 U.S.C. § 2000e(f) (Title VII) ("an individual employed by an employer"); 29 U.S.C. § 630(f) (ADEA) ("an individual employed by any employer"); 29 U.S.C. § 203(e)(1) (FLSA) ("any individual employed by an employer").

While a similar definition has been termed "circular" by this and other courts, *see, e.g., Darden,* 503 U.S. at 323, it is circular only when attempting to make use of each separate term to define the other. But defining the term "*employer*" by reference to the term "individual employed by an employer" is not necessary. Each portion of the definition can be determined according to the precise question presented.

For example, if the question is whether an individual has the right to claim the protection of the discrimination acts against an admitted employer, the only question is whether the individual is an *employee*. If the question is whether an admitted employee is employed by an employing

entity, the only question is whether the employer comprises the requisite number of employees.[12]

Hence, when addressing the question of coverage, the two step inquiry is appropriate. First, what is the nature of the question, *i.e.,* is it in connection with a claim asserted by an admitted employee or rather in connection with a claim brought by a putative "owner"? If the first, and the employing entity is a professional corporation, then the question is merely how many individuals performing traditional employee duties (including shareholders and any others with ownership interests) for the corporation. Concerns over the status of the complaining party as being possibly inconsistent with that of *employee* because he or she is asserting a discrimination claim effectively against himself or herself as an *owner* are not present, and any protections against the difficulties of that situation are not warranted.

On the other hand, when the claim is asserted by a putative owner, *i.e.,* a partner, and the employing entity is the partnership of which the claimant is a part, then the question whether the partner constitutes an employee or rather an owner must be addressed. When the partner has the attributes of a true partner, such as when he or she occupies a position such as that described by Justice Powell in his *Hishon* concurrence, then the federal discrimination

[12] Similarly, if the employee status of the individual is at issue, then traditional independent contractor analysis applies to determine if the individual is an employee at all, and only if employee status is found would the inquiry move to whether the employing entity constitutes a subject employer.

statutes involved here do not apply because the partner is not an employee.[13]

[13] This approach necessarily preserves the economic realities test when addressing claims asserted by those persons holding the title of partner. When the individual is given the title of partner but none of the attendant rights and other indicia of ownership, he or she is more akin to an employee and should not be deprived of the protection of the federal employment discrimination statutes.

Bona fide partners, like independent contractors, are not employees. In *Simpson v. Ernst & Young,* 100 F.3d 436 (6th Cir. 1996), *cert. denied,* 520 U.S. 1248 (1997), the court surveyed the cases applying a totality of the circumstances test to determine when a nominal partner should be classified as a partner or employee:

> The circuits that have already judged the partner/employee dichotomy have done so by "leaving the determination of employment status to case-by-case resolution based on the totality of the circumstances," *Lilley [v. BTM Corp.],* 958 F.2d [746] at 750 [6th Cir., *cert. denied,* 506 U.S. 940, 113 S.Ct. 376, 121 L.Ed.2d 287 (1992)]; *see [Nationwide Mutual Ins. Co. v.] Darden,* 503 U.S. [318] at 323-24, 112 S.Ct. [1344] at 1348-49, 117 L.Ed.2d 581 (1992)] against the backdrop of the Uniform Partnership Act ("UPA"), that has been adopted by most states, including New York, which provides the applicable law to the agreements here under review. *See generally* N.Y. PARTNERSHIP LAW § 1 *et seq.* (McKinney 1988).

In *Wheeler v. Hurdman,* 825 F.2d 257 (10th Cir.), *cert. denied,* 484 U.S. 986, 108 S.Ct. 503, 98 L.Ed.2d 501 (1987), the Tenth Circuit analyzed the "total bundle of partnership characteristics" to distinguish partners from employees. *Id.* at 276. In *Fountain v. Metcalf, Zimc & Co.,* 925 F.2d 1398 (11th Cir.1991), the Eleventh Circuit similarly stated:

> [W]e look to the particular circumstances of the case at hand and, in so doing, we focus not on any label, but on the actual role played by the claimant in the operations of the involved entity and the extent to which that role dealt with traditional concepts of management, control and ownership.

Id. at 1400-01 (citation omitted).

(Continued on following page)

Whether the courts look to a corporation, a professional corporation or an LLC, the inquiry will be the same. The substance of the legal entity is that it is a corporation, which exists as a separate and independent legal entity. As such, all employees of the employing entity are counted for purposes of the relevant Act. Where an LLP is involved, as shown elsewhere in this brief, an economic realities test might be appropriate to determine if the partner of the LLP is by economic reality an employee with standing to bring a federal discrimination claim against the LLP employing entity.[14]

For purposes of determining whether the employing entity has sufficient numbers of employees to subject it to liability, no such test is necessary or appropriate. Here, the

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The *Simpson* court listed the following factors as relevant to the inquiry: "the right and duty to participate in management; the right and duty to act as an agent of other partners; exposure to liability; the fiduciary relationship among partners; use of the term "co-owners" to indicate each partner's "power of ultimate control;" participation in profits and losses; investment in the firm; partial ownership of firm assets; voting rights; the aggrieved individual's ability to control and operate the business; the extent to which the aggrieved individual's compensation was calculated as a percentage of the firm's profits; the extent of that individual's employment security; and other similar indicia of ownership." *Simpson*, 100 F.3d at 443-44 (citing *Fountain*, 925 F.2d at 1400-01; *Wheeler*, 825 F.2d at 276; *Caruso v. Peat, Marwick, Mitchell & Co.*, 664 F.Supp. 144 (S.D.N.Y.1987)) (footnotes omitted).

[14] The dissent below fails to distinguish between an LLP and a general partnership in her comparison of the attributes and liabilities of a professional corporation and partnership. In fact, she makes use primarily of the LLP model for comparison. Because the reasoning that excludes partners from the definition of *employee* for purposes of counting employees for ADA coverage comes from cases addressing general partnerships, the better comparison is between a professional corporation and general partnership.

form chosen by the Clinic was that of a professional corporation. The employing entity was a corporation, not a LLC or a LLP. The employing entity maintained employment relationships with employees and shareholder employees. For purposes of determining if Wells was protected by the ADA, no further inquiry is necessary.

This two-step test provides certainty to employers regarding whether they are subject to federal employment statutes, while at the same time ensuring that protection of the statutory protections are *inclusive* rather than *exclusive*.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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Supreme Court of the United States

CLACKAMAS GASTROENTEROLOGY ASSOCIATES, P.C.,

Petitioner,

v.

DEBORAH ANNE WELLS,

Respondent.

ON A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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ARGUMENT

I. COURTS SHOULD APPLY THE EEOC GUIDANCE FACTORS TO DETERMINE WHETHER THE SHAREHOLDERS/DIRECTORS OF A PROFESSIONAL CORPORATION ARE EMPLOYEES UNDER THE ADA.

The EEOC guidance provides a straightforward framework for analyzing both whether partners, in reality, should be considered employees under the ADA and whether shareholders of a professional corporation, in reality, should be considered partners ("EEOC Br." at 8 and 9)[1] ("EEOC Guidance"). Courts should consider the economic realities of the circumstances using the factors embodied in the EEOC Guidance.

Four different approaches to the question presented in this case have been proposed:

1. The EEOC Guidance, which the Petitioner ("Clinic") supports;
2. The "analytical model," which the Respondent ("Wells") supports, Resp. Br. at 34;
3. The "common law test," which *Amicus* AFL-CIO supports, AFL-CIO Br. at 7; and

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[1] The Respondent's and *amici* briefs are referenced as follows: Brief of Respondent ("Resp. Br."); Brief for the United States and the Equal Employment Opportunity Commission ("EEOC Br."); Brief for the Lawyers' Committee for Civil Rights Under Law, et al. ("Lawyers' Committee Br."); and Brief of the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO Br.").

4. The "*Trainor*" test, which *Amicus* Lawyers' Committee supports, Lawyers' Committee Br. at 14.

The best approach is offered by the EEOC Guidance. The approach of the EEOC Guidance is similar to the approach adopted by this Court in *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992), except that the EEOC uses factors that go to the heart of the distinction between shareholder/directors and employees. The alternative approaches supported by Wells and *amici* share a common shortfall: each takes too narrow a slice of business reality to accommodate the complexities of modern American business.

A. Advantages of the EEOC Guidance

The EEOC Guidance promotes the purposes of the ADA. When Congress adopted the ADA, one of its purposes was to cover larger, not smaller, employers. Large and small employers are not divided by gross or net income, but rather by the number of employees in an enterprise. This makes sense because personnel policies and procedures, including policies designed for ADA compliance, impact people, not income. At least one of the EEOC's Guidance factors addresses this issue head on:

> Whether an organization can hire or fire the individual or *set the rules and regulations of the individual's work*, EEOC Compl. Man. (BNA) §2 at 605:0009 (2002)(emphasis supplied).

"Rules and regulations" are personnel policies. Business entities generally adopt personnel policies to regulate employees' compensation, benefits, hours of work, work assignments, and the like. See e.g. EMPLOYMENT COORDINATOR, ¶ PM 11.061 at 141.051 (West Group, et al. eds., 2002). If, under the EEOC's Guidance factor relating to "rules and regulations," an individual is found to operate independently of the entity's personnel policies, he is less like an employee and more like a proprietor or partner. For example, an individual whose compensation is based on a percentage of net profits, and who selects and pays for his own retirement plan is, in reality, more like a proprietor or partner than an hourly worker whose retirement is her employer's contribution to its retirement plan. Application of the EEOC Guidance, therefore, identifies the individuals who really ought to be covered, regardless of their label. Counting only individuals who are subject to the rules and regulations of the business promotes the objectives of the Act by sparing smaller businesses that are ill-equipped to comply with the ADA, and by giving individuals who are subject to the rules and regulations the right to sue. This is fair both to proprietors and to those who need the ADA's protection.

The EEOC Guidance provides consistency. Businesses that are similarly situated should be treated alike. Two identical clinics which operate exactly the same, differing only in structure, should be treated alike under the ADA. The differences between a professional corporation and a limited liability partnership, for example, are not the kind of differences which impact people; those differences primarily impact how the entities are taxed. The EEOC Guidance looks beyond the label affixed to the business structure at the actual operational realities of the business. That is, it looks to

substance over form. As a result, application of the EEOC Guidance factors consistently treats similarly situated businesses alike.

The EEOC Guidance is workable without being rigid. The EEOC Guidance factors address issues which American businesses deal with day-to-day. Proprietors, managers, supervisors, and employees are perfectly comfortable dealing with issues targeted by the EEOC Guidance, such as who in the organization can hire or fire, who supervises and assigns work, what is the chain of command, and who shares the opportunity for profits and risks of losses of the business. These are factors crafted in terms that individuals involved in the operation of businesses can understand and apply. Similarly, courts and practitioners benefit from a checklist with some objective factors (such as the existence of written employment agreements and participation in profits and losses) and some subjective factors which can be supported or refuted by unambiguous evidence (such as reporting requirements in a personnel flow chart and management authority as set forth in personnel policies).

B. Disadvantages of the Alternative Approaches

1. The "Analytical Model"

The alternative approaches supported by Wells and *amici* take too limited a segment of reality to yield satisfactory results. The "analytical model" supported by Wells examines two factors: the form of business structure and whether, in the case of a professional corporation ("PC"), the shareholders performed traditional employee duties (Resp. Br. at 34). For

professionals in a professional corporation, the answer to the second inquiry in Wells' "analytical model" is always the same: professional shareholders always perform traditional employee duties since they provide the professional services for the clients or patients. Therefore, Wells' analytical model actually looks only to the form of the business structure, an approach that yields inconsistent results for similarly situated businesses and fails to advance the purpose of the ADA.

The "analytical model" applies one test for an individual's right to sue and another test for coverage. This "analytical model" should be rejected for two reasons. First, applying different tests may yield inconsistent results. For example, an individual could find himself an employee for purposes of coverage, but with no right to sue. Second, Wells does not make any attempt to identify anything in the language of the ADA which justifies this bifurcated approach, except the claim that it promotes the remedial purpose of the Act. Resp. Br. at 27. This reasoning was abandoned by this Court in *Darden*, (Citing *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). (*Reid* signaled abandonment of previous emphasis on construing the term 'employee' "in light of the mischief to be corrected and the end to be obtained," *Darden* at 325.) Courts should apply the same test whether the issue is coverage of the ADA or an individual's right to sue.

2. The "Common Law Test"

The "common law test" supported by the AFL-CIO suggests that courts should look to the general common law of Agency found in the RESTATEMENT (SECOND) OF AGENCY. However, the RESTATEMENT does not provide definitive guidance for determining whether

partners, in reality, should be considered employees, and whether shareholders of a professional corporation should be, in reality, considered partners.

The "common law test" relies on the suggestion that the term "employee" in the ADA is synonymous with the RESTATEMENT'S definition of "servant." AFL-CIO Br. at 6. However, that theory fails for two reasons. First, even though a partner is not an employee, the RESTATEMENT acknowledges that a partner who is active in the management or regularly employed in the business of the partnership is a servant of the partnership, RESTATEMENT (SECOND) OF AGENCY §14A at 62 (1958). Such a partner is therefore a servant, but not an employee. Similarly, shareholders of a professional corporation could, and likely would be, servants of the P.C., but still not be employees. Second, it is difficult to imagine a circumstance where a professional partner would not qualify as an employee under the RESTATEMENT test. After all, any doctor, attorney, or accountant, whether in a partnership, a limited liability company ("LLC") or a professional corporation meets the RESTATEMENT definition of employee since she is, on a regular and continuing basis, performing "service in [the enterprises'] affairs" which are controlled or subject to control, at least in some respects, by her colleagues, regardless of the business structure. *Id.* §2(1) at 12. For example, the four physicians in the Clinic are subject to peer review, a form of quality control for patient care. That control or right to control meets the RESTATEMENT test, whether or not the physicians are partners in a partnership or shareholder/directors of a professional corporation.

It is true that in *Darden*, this Court found that the term "employee" should be construed to incorporate traditional agency law principles. *Darden* at 323. Here, however, unlike the distinction between an employee and an independent contractor examined in *Darden*, the distinction between an employee and a shareholder/director of a professional corporation has not accumulated a settled meaning at common law.

3. The "*Trainor*" Test

The "*Trainor*" test fairs no better for similar reasons. The court in *Trainor v. Apollo Metal Specialties, Inc.*, No. 01-5077, 2002 U.S. App. LEXIS 25654 (10th Cir. December 13, 2002) analyzed whether a shareholder/director of a general corporation was, in reality, an employee. There are two reasons why the "*Trainor*" test is not appropriate here. First, the *Trainor* court noted that "courts have distinguished between professional corporations and traditional corporations" on this issue, and that court refused to apply the same test to both. *Trainor* at 7. Second, the *Trainor* court applied a three factor test, which, if applied to a professional partner, would virtually always result in the professional partner being designated an employee. That is, the "*Trainor*" test results in the illogical outcome of professionals being regarded as employees even if they were sole proprietors or partners.

The factors contained in the EEOC guidelines provide a workable framework for analyzing economic realities to determine whether partners are, in reality, employees, and whether shareholders of a professional corporation are, in reality, partners.

II. COURTS SHOULD EXAMINE FACTORS BEYOND THE FORM OF THE BUSINESS ENTITY.

Courts should look beyond the business structure of an entity to ascertain whether that entity is an employer covered by the ADA. The ADA does not differentiate among business structures. Since World War II, American business structures have been evolving from the traditional dichotomy between general partnerships and ordinary corporations to business structures that adopt significant features of both. See PHILIP P. WHYNOTT, THE LIMITED LIABILITY COMPANY §1.60 (Thomas W. Overton ed., 3d ed. 2002). The law needs to remain nimble enough to deal with this evolution. It cannot remain a slave to labels, because those labels no longer clearly identify the economic realities of the business structure.

Wells maintains that, since the Clinic voluntarily adopted the professional corporation structure, this Court should not look beyond that structure at other factors. Resp. Br. at 22. In support of her position, Wells suggests that the Clinic could have selected a number of other forms of business structure. Resp. Br. at 23. However, at the time the Clinic was formed as a professional corporation in 1979[2], the only alternative form of business structure available to professionals was a general partnership. But, as a partnership, the Clinic was not allowed the benefits of either limited liability or a retirement plan like a corporation.

[2] The Clinic has lodged 12 copies of its original Articles of Incorporation with the Court.

It is fundamentally unfair to hold the Clinic's physicians to a different standard under the ADA just because they formed their business in 1979, prior to the adoption of statutes which would have allowed it to become a limited liability partnership ("LLP"). Beginning in the 1980's, Oregon (and most other states) adopted statutes which allow professionals to operate as LLPs and LLCs. WHYNOTT, *supra* at §1:40. Today, professionals like the four physicians in this Clinic, may adopt the LLP form of organization and obtain the same retirement plan and liability benefits as they would as a PC. And, the professionals in the LLP would not be considered employees for purposes of ADA coverage. Further, the Clinic is saddled with being a PC indefinitely. The Clinic cannot convert to an LLP without catastrophic financial consequences, since that conversion would be a taxable event under 26 U.S.C. §331(a)(2001).

Wells' claim that the Clinic has somehow obtained "the best of both worlds" is misleading. This argument implies an improper purpose on the part of the Clinic. However, Wells does not, and cannot, argue that the Clinic elected to exist as a professional corporation in order to avoid the coverage of the ADA. The Clinic was formed as a professional corporation in 1979, 11 years before the ADA was adopted. In reality, the PC is, in many respects, the poor stepchild of the ordinary corporation. Professional corporations cannot make private or public offerings of their stock to obtain capital. Professional corporation shareholders do not enjoy the same full limitation on liability as shareholders in a regular corporation; yet, a PC is taxed as a personal service corporation, 26 U.S.C. §441(i)(2)(2001) (at a higher rate than an ordinary corporation); and the shareholders are subject to tax on their dividends,

subjecting the owners to double taxation. 26 U.S.C. §301(2001).[3] On the other hand, partners in LLPs and members of LLCs enjoy the same limited liability as PC shareholders, but are taxed as partners without double taxation. Professional corporations are burdened with the same record keeping requirements and tax obligations as ordinary corporations, but do not obtain any better tax advantages as their colleagues in LLPs and LLCs.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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[3] It is common practice for a professional corporation to pay bonuses to its shareholder-employees in amounts sufficient to reduce the corporation's taxable income to zero. However, issues may arise regarding these amounts being subject to recharacterization by the Internal Revenue Service as dividends under an unreasonable-compensation argument. See *Pediatric Surgical Associates, P.C.*, TC Memo 2001-81, and Alson R. Martin and Morton A. Harris, *Unreasonable Compensation*: Pediatric Surgical *Poses a Major New Threat for PCs*, 97 J. TAX'N 41 (2002).

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No. 01-1435

In the Supreme Court of the United States

CLACKAMAS GASTROENTEROLOGY ASSOCIATES, P.C.,
PETITIONER

v.

DEBORAH WELLS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE SUPPORTING PETITIONER IN PART

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QUESTION PRESENTED

An "employer" is covered by Title I of the Americans with Disabilities Act of 1990 when it has 15 or more "employees." 42 U.S.C. 12111(5)(A). The question presented is whether physicians who are shareholder-directors of a professional corporation are "employees" within the meaning of that provision when the physicians actively engage in the corporation's medical practice.

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DEBORAH WELLS

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BRIEF FOR THE
UNITED STATES AND THE EQUAL EMPLOYMENT
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SUPPORTING PETITIONER IN PART

INTEREST OF THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

An employer is covered by Title I of the Americans with Disabilities Act of 1990 (ADA) when it has 15 or more employees. 42 U.S.C. 12111(5)(A). This case concerns the standards for determining whether shareholder-directors of a professional corporation are "employees" within the meaning of that coverage provision. The United States has a substantial interest in the resolution of that question. The Equal Employment Opportunity Commission (EEOC) has authority to enforce Title I of the ADA with respect to private employers, 42 U.S.C. 12117(a), and to issue regulations to

carry out that title, 42 U.S.C. 12116. The EEOC also has authority to enforce Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967 (ADEA), both of which contain similar minimum employee thresholds for coverage. 42 U.S.C. 2000e(b) (15-employee threshold for coverage under Title VII); 29 U.S.C. 630(b) (20-employee threshold for coverage under the ADEA). The EEOC has issued guidance on the factors that it considers in determining whether members of boards of directors and major shareholders are employees within the meaning of the nondiscrimination statutes that the EEOC enforces. See EEOC Compl. Man. (BNA) § 2, at 605:0009 (2002) (Threshold Issues). The EEOC applies that guidance not only in determining whether an employer has the minimum number of employees to be covered by the applicable nondiscrimination statutes, but also in determining whether a complaining party is an employee who may invoke the protections of those Acts. *Ibid.*

STATEMENT

1. In 1986, respondent Deborah Anne Wells began working for petitioner Clackamas, a medical practice organized as a professional corporation under Oregon law. Pet. App. 2a. Petitioner's sole shareholders and directors were four physicians who actively engaged in petitioner's medical practice. *Ibid.* In 1997, petitioner terminated respondent's employment. *Ibid.*

Following her termination, respondent brought suit against petitioner, alleging that petitioner illegally terminated her employment based on her disability, in violation of Title I of the ADA. Pet. App. 2a. Title I of the ADA makes it unlawful for a "covered entity" to "discriminate against a qualified individual with a disability * * * in regard to * * * discharge of em-

ployees." 42 U.S.C. 12112(a). A "covered entity" includes an "employer," 42 U.S.C. 12111(2), and an "employer" is defined as a "person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year." 42 U.S.C. 12111(5)(A). An "employee" is defined as "an individual employed by an employer." 42 U.S.C. 12111(4).

Petitioner moved for summary judgment, arguing that it did not have the requisite number of employees to be covered by the ADA. Pet. App. 2a. It is undisputed that petitioner meets the ADA's 15-employee coverage threshold if its four physician shareholder-directors are counted as "employees." *Ibid.* Petitioner falls short of that threshold, however, if those physicians are not counted as employees. *Ibid.*

The district court granted summary judgment for petitioner. Pet. App. 18a-25a. Applying an "economic realities" test for determining whether an individual is an employee, the court concluded that the four physicians were not employees, but "employers who own and manage their own business." *Id.* at 23a. In reaching that conclusion, the court found it persuasive that the four physicians constitute the board of directors, own the corporation, control the management of the corporation, share in the corporation's profits, and remain personally liable for malpractice claims. *Ibid.*

2. A divided panel of the Ninth Circuit reversed. Pet. App. 1a-11a. The panel majority framed the issue as follows: "Whether shareholders of a professional corporation who are actively engaged in conducting the business of the corporation are 'employees' under the ADA." *Id.* at 3a. The majority noted that there was a conflict in the circuits relating to that issue. Applying an "economic realities" test, the Seventh Circuit had

held in *EEOC* v. *Dowd & Dowd, Ltd.*, 736 F.2d 1177 (1984), that shareholder-directors in a professional corporation are analogous to partners in a partnership, and therefore, like partners, should not be counted as employees. Pet. App. 4a. In contrast, the Second Circuit had held in *Hyland* v. *New Haven Radiology Associates*, 794 F.2d 793 (1986), that the use of a corporate form precludes any inquiry into whether an entity is in fact a partnership. Pet. App. 4a.

The majority found "*Hyland*'s reasoning to be considerably more persuasive than *Dowd*'s." Pet. App. 4a. The majority reasoned that "[b]ecause the decision to incorporate is presumably a voluntary one, there is no reason to permit a professional corporation to secure the 'best of both possible worlds' by allowing it both to assert its corporate status in order to reap the tax and civil liability advantages and to argue that it is like a partnership in order to avoid liability for unlawful employment discrimination." *Ibid.*

The majority rejected petitioner's reliance on Ninth Circuit precedent that requires application of an "economic realities" test in determining whether an individual labeled a partner is an employee. Pet. App. 5a (citing *Strother* v. *Southern Cal. Permanente Med. Group*, 79 F.3d 859 (9th Cir. 1996)). The majority reasoned that, in that context, an economic realities test "prevent[s] a firm from labeling the bulk of its employees as partners simply to insulate itself from liability for discrimination." That rationale, the majority concluded, does not support the use of an "economic realities" test "in order to classify shareholder-employees of a corporate enterprise as partners." *Ibid.*

The majority next concluded that "the status of [petitioner's] four physician-shareholders as employees is clear." Pet. App. 5a. The majority noted that the

four physicians "actively participated in the management and operation of the medical practice and literally were employees of the corporation under employment agreements." *Ibid.* Based on its determination that petitioner's physician-shareholders were "employees of the corporation, not partners in it," the court concluded that petitioner "had a sufficient number of employees to qualify as an 'employer' and as a 'covered entity' under the [ADA]." *Id.* at 5a-6a.

Judge Graber dissented. She would have adopted an "economic realities" test to determine whether a shareholder-director in a professional corporation is an employee within the meaning of the ADA. Pet. App. 6a. Judge Graber explained that Ninth Circuit precedent "caution[s] against being governed by labels, rather than realities," that "a physicians' professional corporation in Oregon has many attributes of a partnership," and that "the purpose of the numerical requirement in the ADA is to separate small from large enterprises, not to adhere to the vagaries of tax law or tort liability." *Ibid.* Applying an economic realities test, Judge Graber concluded that because petitioner's shareholder-directors exercise control over the medical practice, share profits, and remain personally liable to patients for malpractice claims, they should be classified as partners, rather than employees. *Id.* at 9a.

SUMMARY OF ARGUMENT

The court of appeals in this case erred in holding that shareholder-directors of a corporation are automatically "employees" just because they have elected to organize their business as a corporation and they engage in the business of the corporation. Consistent with the EEOC's guidance, the question whether shareholder-directors are "employees" depends on whether they

operate independently and manage the business or instead are subject to the business's control.

The EEOC's approach furthers the ADA's protective function. By classifying as "employees" shareholder-directors who are subject to the business's control, the EEOC's approach ensures that the ADA's protections will extend to those, who despite their titles, remain vulnerable to unlawful discrimination. At the same time, by classifying as non-employee proprietors those who operate independently and manage the business, the EEOC's approach excludes from protection those who are least vulnerable to such discrimination.

The EEOC's approach is also consistent with the way in which courts of appeals have uniformly analyzed whether a partner is an employee. In that context, the courts have not allowed a person's designation as a partner to preclude an inquiry into whether that person owns and manages the business or is instead subject to the firm's control. The election to employ the corporate form does not obviate the need for that inquiry. Accordingly, the same legal standard is relevant in determining whether a shareholder-director is an employee.

The EEOC's standard is workable in practice and consistent with the common law. In accord with the EEOC's guidance, courts have examined a range of factors that distinguish between those who own and manage a business and those who are subject to that business's control. And like the common law test for determining whether a person is a servant, the EEOC's approach makes the extent of an organization's control over a person a crucial factor in determining whether that person is an employee.

While the court of appeals in this case erred in holding that shareholder-directors who perform services for the corporation are automatically employees, some

courts applying a so-called "economic realities" test have departed from the correct analysis as well. The relevant inquiry is not whether shareholder-directors are partners, as some of those cases suggest. Instead, the relevant inquiry with respect to both shareholder-directors and partners is whether they operate independently and manage the business or instead are subject to the business's control. This case should be remanded to the court of appeals for application of that standard.

ARGUMENT

THE STATUS OF SHAREHOLDER-DIRECTORS DEPENDS ON WHETHER THEY OPERATE INDEPENDENTLY AND MANAGE THE BUSINESS OR ARE SUBJECT TO THE ORGANIZATION'S CONTROL

An employer is covered by the ADA when it has 15 or more employees. The question presented in this case is whether shareholder-directors of a professional corporation are employees within the meaning of that coverage provision when they actively participate in the operation of their firm's practice. That question of employee status arises not only under the ADA, but under Title VII of the Civil Rights Act of 1964, and the Age Discrimination in Employment Act, both of which contain similar minimum employee thresholds for coverage. 42 U.S.C. 2000e(b) (15-employee threshold for coverage under Title VII); 29 U.S.C. 630(b) (20-employee threshold for coverage under the ADEA).

In resolving the question whether petitioner's shareholder-directors are employees within the meaning of the ADA, the court of appeals placed dispositive weight on the physicians' choice of the corporate form and their decision to establish formal employment agreements between the corporation and themselves.

That was error. Under the ADA, in order to decide whether shareholder-directors are employees, a court should examine the actual relationship between those individuals and the corporation to determine whether they function more like proprietors than employees. In particular, a court should examine whether shareholder-directors operate independently and manage the business or instead are subject to the firm's control. If the shareholder-directors operate independently and manage the business, they are proprietors and not employees; if they are subject to the firm's control, they are employees.

A. Under The EEOC's Guidance, The Employment Status Of Shareholder-Directors Depends On Whether They Operate Independently And Manage The Business Or Whether They Are Subject To The Organization's Control

The text of the ADA does not specifically address whether, or to what extent, shareholder-directors of a corporation should be regarded as employees. Moreover, the ADA's definition of employee is unhelpful in resolving the question presented in this case. Title I of the ADA defines "employee" to mean "an individual employed by an employer." 42 U.S.C. 12111(4). As this Court explained in *Nationwide Mutual Insurance Co.* v. *Darden*, 503 U.S. 318, 322 (1992), that "definition is completely circular and explains nothing."

The EEOC, however, has issued guidance on when "partners, officers, members of boards of directors, and major shareholders" should be regarded as employees for purposes of the nondiscrimination statutes the EEOC enforces, including the ADA. See EEOC Compl. Man. (BNA) § 2, at 605:0009 (2002) (Threshold Issues). Under the EEOC's guidance "[a]n individual's

title * * * does not determine whether the individual is a partner, officer, member of a board of directors, or major shareholder, as opposed to an employee." *Ibid.* The relevant question in each case is "whether the individual acts independently and participates in managing the organization, or whether the individual is subject to the organization's control." *Ibid.* "If the individual is subject to the organization's control, s/he is an employee." *Ibid.*

The EEOC's guidance provides that the following factors are relevant in making that determination:

> * Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work
>
> * Whether and, if so, to what extent the organization supervises the individual's work
>
> * Whether the individual reports to someone higher in the organization
>
> * Whether and, if so, to what extent the individual is able to influence the organization
>
> * Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts
>
> * Whether the individual shares in the profits, losses, and liabilities of the organization

EEOC Compl. Man., *supra*, at 605:0009.

Those factors are not intended to be exhaustive. The EEOC's guidance cites with approval court of appeals decisions that share the EEOC's basic approach and elaborate and expand upon the EEOC's factors. EEOC

Compl. Man., *supra*, at 605:009 n. 78 (citing *Serapion* v. *Martinez*, 119 F.3d 982, 989-990 (1st Cir. 1997), cert. denied, 522 U.S. 1047 (1998), and *Devine* v. *Stone, Leyton & Gershman, P.C.*, 100 F.3d 78, 81-82 (8th Cir. 1996), cert. denied, 520 U.S. 1211 (1997)). For example, the First Circuit in *Serapion* focused on, *inter alia*, the individual's role in firm governance. The EEOC's guidance and those cases effectively draw a distinction between proprietors who own and manage a business and that business's employees.

Under this Court's decisions, the EEOC's guidance, while not controlling, reflects a body of experience and informed judgment upon which the Court may properly rely. *Meritor Sav. Bank* v. *Vinson*, 477 U.S. 57, 65 (1986); see *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944). Because the standard reflected in the EEOC's guidance provides a sound and workable framework for resolving the question presented in this case, the Court should adopt that standard.

B. The EEOC's Approach Accords With The ADA's Protective Function

The question whether a person is an employee arises under Title I of the ADA not only because that title has a 15-employee threshold for coverage. That issue also arises, because Title I extends its nondiscrimination protections only to prospective, present, or former "employees." See 42 U.S.C. 12112(a) ("No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of emploment."). Under the terms of the ADA, the "employees" who may invoke the ADA's

protections against discrimination in "hiring, advancement, or discharge," 42 U.S.C. 12112(a), are the same "employees" who count toward the 15-employee threshold for coverage. 42 U.S.C. 12111(5)(A). To decide who qualifies as an employee for purposes of satisfying the ADA's minimum coverage formula it is therefore necessary to decide to whom Congress intended to extend protection against discrimination in employment.

The EEOC's guidance sensibly captures the class of intended beneficiaries of the Act's protections. By refusing to allow labels such as partner, shareholder, and director, to take individuals out of the Act's coverage when those persons in reality are subject to the organization's control, the EEOC's approach ensures that the ADA's protections will extend to those who, despite their titles, remain vulnerable to the kinds of treatment prohibited by the Act. Conversely, by classifying as non-employees those shareholders, partners, officers, and directors who actually own and manage the business, the EEOC's guidance excludes from protection those who are most able to control the firm's practices and who, as a consequence, are least vulnerable to the discriminatory treatment prohibited by the Act.

For example, if a person is a shareholder-director, but in fact is supervised in his work, reports to someone higher in the organization, and has little influence on the terms and conditions under which he works, he would be vulnerable to the kinds of treatment prohibited by the ADA. On the other hand, if an individual is the president, sole director, and sole shareholder of a corporation, that individual would have the ability to control the firm's practices and would not be vulnerable to the kind of treatment prohibited by the ADA. The EEOC's guidance soundly treats the first person as an employee, and the second person as a non-employee

proprietor. See *Drescher* v. *Shatkin*, 280 F.3d 201, 204 (2d Cir. 2002) (holding sole director and sole shareholder of a corporation is not an employee who may sue the corporation under Title VII "by reason of its rules, policies, or conduct, as they are within his power to change"). The Ninth Circuit's approach, in contrast, would treat the second person as an employee, if, but only if, the sole proprietor chose to incorporate.

In *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 346 (1997), this Court interpreted the term "employee" in Title VII to include former employees, in part, because excluding that class of persons "would be destructive" of "a primary purpose of antiretaliation provisions: [m]aintaining unfettered access to statutory remedial mechanisms." For similar reasons, the EEOC's approach reflects an appropriate interpretation of the term "employee." The EEOC's distinction between proprietors who own and manage the business and the employees who are subject to that business's control accords with the Act's overriding protective function.

C. The EEOC's Guidance Accords With The Test That Courts Apply To Determine Whether A Partner Is An Employee

The EEOC's guidance is also consistent with the way the courts of appeals have, for the past 25 years, uniformly approached the question whether partners are employees within the meaning of nondiscrimination statutes, including the ADA. In resolving that question, the courts of appeals have not allowed an individual's formal designation as a partner to preclude an inquiry into whether that individual is an employee. Instead, consistent with the EEOC's guidance, courts have focused on the actual working relationship between the individual and the partnership.

For example, in *Serapion*, 119 F.3d at 987, one of the cases cited in the EEOC's guidance, the First Circuit held that "the Title VII question cannot be decided solely on the basis that a partnership calls—or declines to call—a person a partner." Instead, "[a] court must peer beneath the label and probe the actual circumstances of the person's relationship with the partnership." *Ibid.* In particular, the First Circuit held that a court must determine whether a person designated a partner is nonetheless an employee by considering such factors as whether (1) the individual has an investment in the firm, (2) the individual owns firm assets, (3) the individual is liable for firm debts, (4) compensation is based on a firm's profits, (5) the individual has a right to engage in policymaking, (6) the individual participates in, and has voting power with regard to firm governance, (7) the individual has the ability to assign work and to direct the activities of employees within the firm, and (8) the individual has the ability to act for the firm and its principals. *Id.* at 990.

Similarly, in *Simpson* v. *Ernst & Young*, 100 F.3d 436 (6th Cir. 1996), cert. denied, 520 U.S. 1248 (1997), the court rejected the contention that a person's designation as a partner foreclosed an inquiry into that person's status as an employee. The court instead held that a court should decide whether a person designated a partner is an employee by examining the same basic set of factors as that outlined in *Serapion* and the EEOC's guidance. *Id.* at 443-444.

The Ninth Circuit itself has adopted the same approach for evaluating a partner's employment status. In *Strother* v. *Southern California Permanente Medical Group*, 79 F.3d 859, 867 (1996), the Ninth Circuit held that "determining whether an individual is an employee typically requires a factual inquiry which

goes beyond merely the partnership agreement and the partner label." Instead, "[c]ourts must analyze the true relationship among partners, including the method of compensation, the 'partner's' responsibility for partnership liabilities, and the management structure and the 'partner's' role in that management." *Ibid.* See *EEOC* v. *Sidley, Austin, Brown & Wood*, No. 02-1605, 2002 WL 31387525, at * 5 (7th Cir. Oct. 24, 2002) ("A firm that under pursuit by the EEOC on suspicion of discrimination redesignated its employees 'partners' without changing the preexisting employment relation an iota would not by doing this necessarily buy immunity, even if the redesignation sufficed to make them partners under state law."); *Wheeler* v. *Hurdman*, 825 F.2d 257, 277 (10th Cir.) ("an employer may not evade the strictures of Title VII simply by labeling its employees as 'partners'") (quoting *Hishon* v. *King & Spalding*, 467 U.S. 69, 79 n.2 (1984) (Powell, J., concurring)), cert. denied, 484 U.S. 986 (1987).

The Ninth Circuit in this case acknowledged that it is appropriate to look beyond the label and examine the actual relationship between the individual and the firm to decide whether a partner is an employee. Pet. App. 5a. It concluded, however, that the same approach is not warranted in the corporate context. *Ibid.* Nothing in the text of the ADA provides any support for the Ninth Circuit's bifurcated approach to the issue of employee status. In particular, nothing in the ADA suggests that a court should apply one legal standard to decide whether a partner is an employee and apply a completely different legal standard to decide whether a shareholder-director is an employee.

The Ninth Circuit concluded that it would be inequitable for a corporation "to reap the tax and civil liability advantages" of the corporate form and yet still benefit

from the same basic economic realities test used in the partnership context. Pet. App. 4a. In the court's view, a corporation should not be able "to secure the 'best of both possible worlds.'" *Ibid.* That reasoning is flawed. The ADA is entirely neutral on questions of corporate organization. It governs "employers" without distinguishing among unincorporated proprietorships, partnerships, or corporations. The number of employees matters; the structure of the business does not. As a result, there is no justification for a court to interpret the ADA in a way that seeks to counterbalance the perceived advantages of the corporate form. There are sufficient means to combat abuses of the corporate form without allowing such concerns to influence the scope of the ADA. A business may not avoid coverage under the ADA simply by altering its business form, but likewise, the act of incorporation, without more, should not result in a *change* in a business's coverage status.

The Ninth Circuit also concluded that looking to the actual relationship between a partner and a firm is permissible because it leads to expanded coverage, while looking to the actual relationship between a shareholder-director and the corporation cannot be justified on that basis. Pet. App. 5a. But nothing in the ADA suggests that a court is free to pick and choose the legal standard to apply depending on whether it leads to expanded or reduced coverage. If, as the court of appeals acknowledged, a court should look to an individual's ownership, management, and control of an organization, rather than his formal designation, to decide whether a partner is an employee, the same inquiry should govern whether a shareholder-director is an employee.

Indeed, the court of appeals' application of different legal standards cannot be reconciled with the ADA's

protective function. Shareholder-directors are not by virtue of their designations any more or less vulnerable than partners to the treatment prohibited by the ADA. Nor do partners become more vulnerable based on a decision to incorporate. The vulnerability of shareholder-directors turns on neither the corporate form nor on labels but, as with partners, on whether they own and manage the firm or on whether they are instead subject to the firm's control.

There is also no basis for distinguishing between shareholder-directors and partners based on the purposes of the 15-employee threshold for coverage under the ADA. The purpose of that minimum employee threshold is "to spare very small firms from the potentially crushing expense of mastering the intricacies of the antidiscrimination laws, establishing procedures to assure compliance, and defending against suits when efforts at compliance fail." *Papa* v. *Katy Indus., Inc.*, 166 F.3d 937, 940 (7th Cir.), cert. denied, 528 U.S. 1019 (1999); see *Tomka* v. *Seiler Corp.*, 66 F.3d 1295, 1314 (2d Cir. 1995) (reviewing the legislative history applicable to the comparable provision in Title VII). In terms of those purposes, there is no logical reason to distinguish between partners who manage and control a business and shareholder-directors who play the same role.

To paraphrase Judge Graber's dissenting opinion, under the court of appeals' decision, a small clinic that has four physician shareholder-directors and 11 workers is automatically covered by the ADA, while an identical clinic next door is not a covered entity if the physicians are partners who own, manage, and control the business. As Judge Graber explained, "[b]ecause the very purpose of the 15-employee threshold is

economic, it makes no sense to treat Clinic #1 and Clinic #2 differently." Pet. App. 9a.

D. The EEOC's Standard Is Workable

The EEOC's approach provides a workable standard for resolving an individual's employee status. Several examples help to illustrate how the standard should be applied. Under the EEOC's guidance, a corporate employer could not transform its employees into non-employee proprietors by providing them with stock in the corporation, but otherwise leaving their status unchanged. See *Goldberg* v. *Whitaker House Coop., Inc.*, 366 U.S. 28, 32 (1961). In that example, the employees would remain subject to the corporations's control notwithstanding their shareholder status.

Similarly, an employer's designation of an individual as a partner cannot deprive that individual of employee status when the individual lacks most of the traditional indicia of being a partner. The Sixth Circuit's decision in *Simpson* is illustrative. In that case, a management committee in the firm exercised exclusive control over the admission and discharge of all personnel, the management committee unilaterally determined compensation of all personnel, the nominal partner had no vote for members of the management committee, and the nominal partner did not share in the firm's profits and losses. 100 F.3d at 443-444. In those circumstances the court understandably agreed with the district court's conclusion that "for all practical purposes," the nominal partner "was an employee with the additional detriment of having promised to be liable for the firm's losses." *Id.* at 442.

In contrast, the First Circuit's decision in *Serapion* involved a partner who had such a pervasively proprietary role that she could not be regarded as an

employee. 119 F.3d at 990-992. The partner at issue had an equity interest in the firm, her compensation was predicated to a significant extent on the firm's profits, she made substantial capital contributions to the firm, she had a vote on all matters brought before the policymaking body of the firm, and she served as one of five voting members of the committee that managed the firm's day-to-day affairs. *Ibid.* Although some other members of the firm wielded greater influence, that fact alone was insufficient to show that the partner at issue was an employee. *Id.* at 991-992.

Similarly, the Eighth Circuit's decision in *Devine* involved shareholder-directors who were so pervasively involved in the firm's management that they could not be viewed as employees. 100 F.3d at 81. The shareholder-directors participated in management decisions, set firm policy, hired new employees, admitted new shareholders, set billing rates, supervised the firm's work, made capital contributions, were responsible for firm debts, and were compensated based on the firm's profits. *Ibid.* While the plaintiff asserted that the corporation exercised control over the work of the shareholder-directors, the court concluded that "[t]his does not describe how the business was actually run." *Id.* at 82.

To be sure, other cases may not be as straightforward as those discussed above, and will require a court to make a "case-specific assessment of whether a particular situation is nearer to one end of the continuum or the other." *Serapion*, 119 F.3d at 990. But case-by-case development is a standard feature of common law efforts to define employees. It does not detract from the workability of the EEOC's standard.

Obviously, a rigid rule that stressed formality over substance and placed dispositive weight on the corporate form would be easier to administer. But ease of administration is not an end in itself, and such a rule would fail to implement the statutory directive faithfully. See *Serapion*, 119 F.3d at 990 ("[A]ny effort to formulate a hard-and-fast rule would likely result in a statement that was overly simplistic, or too general to be of any real help."); *Devine*, 100 F.3d at 81 ("A rigid per se rule that stresses organizational form over substance might be easier to apply, but it also might undermine the statutory purposes."). Moreover, whatever else can be said about the ADA's circular definition of employee, it hardly suggests that Congress perceived this to be an issue that lent itself to categorical rules.

E. The EEOC's Guidance Incorporates Common Law Principles

In interpreting the term "employee" in other federal statutes, this Court has frequently looked to the common law for guidance. For example, in *Community for Creative Non-Violence* v. *Reid*, 490 U.S. 730, 739-740 (1989), the Court held that the term "employee" in the Copyright Act refers to common law servants and does not embrace independent contractors. Similarly, in *Darden*, 503 U.S. at 323, the Court held that the term employee in ERISA encompasses common law servants and not independent contractors. See *Kelley* v. *Southern Pac. Co.*, 419 U.S. 318, 322-323 (1974); *Baker* v. *Texas & Pacific Ry.* 359 U.S. 227, 228 (1959) (per curiam); *Robinson* v. *Baltimore & Ohio R.R.*, 237 U.S. 84, 94 (1915).

Under the common law, a servant is "an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control

by the master." Restatement (Second) of Agency § 2(2) (1958). Like that common law standard, the EEOC guidance makes the extent of an employer's control of a worker's performance a crucial consideration in its assessment of whether that person is an employee. EEOC Compl. Man., *supra*, at 605:0009.

At the same time, the EEOC's guidance does not purport to adopt in all its particulars the common law definition of a servant. *Meritor Sav.*, 477 U.S. at 72 ("common law principles may not be transferable in all their particulars" to federal statutes); *Faragher* v. *City of Boca Raton*, 524 U.S. 775, 797 (1998) (federal statutes do not call for "mechanical application of [the] indefinite and malleable factors set forth in the Restatement"). The reason is that the common law standard is designed to distinguish between servants and independent contractors for the purpose of determining when an employer is subject to vicarious liability. Restatement (Second) of Agency, *supra*, §§ 2, 219, 220. The distinction in the present context is not between *independent contractors* and employees, but between *proprietors* and employees. And the purpose of the distinction is not to determine the scope of an employer's vicarious liability, but to determine who receives protection against discrimination based on a disability.

Consistent with that underlying difference, the EEOC's guidance sets forth a different set of factors for resolving the question of employee status from the ones that appear in *Darden* and *Reid*. See *Darden*, 503 U.S. at 323; *Reid*, 490 U.S. at 751-752.* Just as the factors

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* In *Darden*, the Court stated that "[a]mong the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party." 503 U.S. at 323.

set forth in *Darden* and *Reid* provide an appropriate framework for distinguishing between independent contractors and employees, the EEOC's factors provide an appropriate framework for distinguishing between proprietors and employees.

The Eighth Circuit decision in *Devine* v. *Stone, Leyton & Gershman, P.C.*, 100 F.3d 78 (1996), cert. denied, 520 U.S. 1211 (1997), is instructive on that point. In that case, the court addressed whether shareholder-directors of a professional corporation were employees within the meaning of Title VII. Relying on the "established meaning" of the term "employee," and this Court's decision in *Darden*, the Eighth Circuit adopted an approach that parallels the EEOC's guidance. *Devine*, 100 F.3d at 80. Specifically, that court held that the relevant inquiry is whether the shareholder-directors "manage and own" the business. *Ibid.* The court further held that the relevant factors to consider in making that determination include whether the shareholder-directors participate in setting firm policy, whether they contribute to the firm's capital, whether they are liable for the firm's debts, and whether their compensation is based on profits. *Ibid.*

While the *Devine* court based its analysis on the common law approach outlined in *Darden*, it rejected as unhelpful the particular factors set forth in *Darden* and *Reid* for determining employee status. The court explained that "[t]hose cases use agency principles to

determine whether an individual is part of the enterprise," *Devine*, 100 F.3d at 81 n.4, "[t]he shareholder-directors [here] are clearly part of [the enterprise]," and "[t]he question is whether they manage and own the firm." *Ibid.* Other courts have similarly recognized that the factors used to distinguish between independent contractors and employees are not useful in distinguishing between proprietors and employees, and have looked to factors like those set forth in the EEOC's guidance instead. See *Serapion*, 119 F.3d at 986; *Wheeler*, 825 F.2d at 271- 272.

F. The Relevant Inquiry Is Not Whether Director-Shareholders Are Partners

As the previous discussion makes clear, the court of appeals did not conduct the correct legal inquiry in this case. In deciding that petitioner's four shareholder-directors are employees within the meaning of the ADA, the court of appeals relied on the physicians' creation of a corporate form, and their decision to establish employment agreements between themselves and the corporation. Pet. App. 4a-5a. The court of appeals failed to undertake the crucial inquiry into whether the physicians operate independently and manage the business or instead are subject to the corporation's control. The court also failed to examine many of the relevant factors found in the EEOC's guidance and the appellate cases that track the EEOC's approach.

Although the court of appeals failed to follow the correct approach, some cases purporting to apply the so-called "economic realities" test in the corporate context deviate from the correct analysis as well. In particular, the tendency in some of those cases is to ask only whether professional corporations are analogous to

partnerships or whether shareholder-directors are analogous to partners as if the answer to those questions automatically resolves the question whether particular shareholder-directors are employees. See, *e.g.*, *EEOC* v. *Dowd & Dowd, Ltd.*, 736 F.2d 1177 (7th Cir. 1984). The tendency of that approach is to transform every professional corporation, by operation of law, into a de facto partnership, and every shareholder, without regard to circumstance, into a non-employee partner.

That approach is no more consistent with the ADA than the approach adopted by the court of appeals in this case. Both have a common defect of deflecting attention from the core statutory concern of whether an individual is an employee. The heart of the matter is whether an individual exercises a degree of control inconsistent with employee status, not the individual's title or the use of the corporate form. The ADA does not exclude partners from its definition of employees, *Sidley, Austin*, 2002 WL 31387525, at *4, so a finding that a shareholder-director should be regarded as a partner does not answer the ultimate statutory question.

Thus, in resolving the status of shareholder-directors, the "economic reality" that matters for ADA purposes is not whether such persons are partners. Instead, the relevant question with respect to shareholder-directors, like the relevant question with respect to partners, is whether they operate independently and manage and control the business, or instead are subject to the organization's control.

G. The Case Should Be Remanded For A Determination Of The Status Of Petitioner's Physicians Under The Correct Legal Standard

The remaining question is whether, applying the correct legal standard, petitioner's shareholder-directors are employees. The district court found that the four physicians constitute the board of directors, own the professional corporation, control the management and operations of the medical practice, share in the profits of the professional corporation, and are personally liable for malpractice claims against them. Pet. App. 23a. Those findings suggest that petitioner's shareholder-directors may not be employees.

The court of appeals, however, has not yet addressed whether petitioner's shareholder-directors are employees under the correct legal standard. It also has not considered whether there is evidence in the record that might call into question any of the district court's findings. The Court should therefore remand for a determination whether, under the correct legal standard, petitioner's four shareholder-directors are employees. See *Darden*, 503 U.S. at 328 (remanding for determination of employee status under the correct legal standard).

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

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CLACKAMAS GASTROENTEROLOGY ASSOCIATES, P.C.,

Petitioner,

v.

DEBORAH ANNE WELLS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, ET AL. AS *AMICI CURIAE* IN SUPPORT OF THE RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

This brief is submitted by *amici* comprised of national membership organizations of attorneys who represent individual plaintiffs in employment discrimination actions, and national law and policy organizations dedicated to advancing and protecting the civil rights of individuals with disabilities.

Amici have expertise and interest in the interpretation of a wide range of federal anti-discrimination statutes, including Title VII, Age Discrimination in Employment Act (ADEA), Employee Retirement Income Security Act (ERISA) and Fair Labor Standards Act (FLSA), as well as the Americans with Disabilities Act (ADA) under which Respondent asserts her claims. Given this expertise and interest, *amici* have previously participated in other significant U.S. Supreme Court cases involving the interpretation of federal anti-discrimination laws and employee rights.

Although this particular case is brought under the ADA, the definition of "employee" at issue in this case is nearly identical to the definition contained in other federal civil rights statutes. *Amici* desire to offer input here because the Court's construction of the definition of "employee" will have a significant impact on the clients and communities they represent. Specifically, the Court

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no person or entity other than the *amici curiae*, and their undersigned counsel made a monetary contribution to the preparation or submission of this brief. No attorney for any party authored this brief in whole or in part. Written consent to the filing of this brief has been obtained from the parties in accordance with Supreme Court Rule 37.3(a). Copies of the consent letters have been filed with the Clerk.

will decide whether shareholders in a professional corporation must be counted as "employees" under federal civil rights statutes, and accordingly how the scope of coverage of professional corporations is to be determined under these laws.

In the view of the a*mici*, the effective enforcement of the ADA and other civil rights statutes requires a broad interpretation of coverage consistent with their remedial purposes. The exclusion from statutory coverage of shareholders of professional corporations would be a narrow coverage interpretation inconsistent with statutory purpose. Moreover, the so-called "economic realities test" proposed by the Petitioner and the Government creates unnecessary uncertainty concerning the application of the ADA and promises to result in an inappropriately fact intensive case-by-case inquiry as to the threshold question of statutory coverage. For these reasons, *amici* respectfully request that the Court consider their views when deciding the standard for counting employees who work at professional corporations.

The National Employment Lawyers Association (NELA) and its state and local affiliates have a membership of over 3,000 attorneys, and NELA is the country's only professional membership organization of lawyers who regularly represent employees in labor, employment and civil rights disputes. NELA regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. NELA has filed *amicus curiae* briefs before this Court and numerous courts of appeals regarding the proper interpretation and application of the Americans with Disabilities Act (ADA) to insure that this law is fully enforced and that the rights of workers are fully protected. For example, NELA filed an *amicus curiae* brief in this Court's decision in *University of*

Alabama at Birmingham, Board of Trustees v. Garrett, 531 U.S. 356 (2001).

The Bazelon Center for Mental Health Law (Bazelon Center) is a national public interest organization founded in 1972 to advocate for the rights of individuals with mental disabilities. The Bazelon Center has engaged in litigation, administrative advocacy, and public education to promote equal opportunities for individuals with mental disabilities, including in the workplace. Much of our work involves efforts to remedy disability-based discrimination through enforcement of the ADA.

The Disability Rights Education and Defense Fund, Inc. (DREDF), based in Berkeley, California, is the nation's premier law and policy center dedicated to protecting and advancing the civil rights of people with disabilities. Founded in 1979, DREDF pursues its mission through education, advocacy and law reform efforts, and is nationally recognized for its expertise in the interpretation of federal disability civil rights laws.

The National Association of Protection and Advocacy Systems, Inc. (NAPAS) is the membership organization for the nationwide system of protection and advocacy (P&A) agencies. Located in all 50 states, the District of Columbia, Puerto Rico, and the federal territories, P&As are mandated under various federal statutes to provide legal representation and related advocacy services on behalf of all persons with disabilities in a variety of settings. The P&A system comprises the nation's largest provider of legally based advocacy services for persons with disabilities. NAPAS facilitates coordination of P&A activities and provides training and technical assistance to the P&A network. This case is of particular interest to NAPAS because P&As represent individuals with disabilities in employment discrimination cases.

SUMMARY OF ARGUMENT

This case addresses the standards for determining whether a shareholder of a professional corporation is an employee for purposes of coverage under the ADA. The ADA prohibits a "covered entity" from discriminating against a qualified individual with a disability because of that disability. 42 U.S.C. § 12112(a). A "covered entity" includes an "employer," which is defined as "a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year." 42 U.S.C. § 12111(5)(A). In the court below, Respondent established that Petitioner had 15 or more employees by counting the entity's physician-shareholders, who were actively engaged in their medical practice, as employees. There is no dispute that Petitioner would not be a "covered entity" if these physician-shareholders were counted as partners of the firm.

Courts have followed two competing approaches for analyzing whether shareholders of a professional corporation are employees or partners. The first approach requires consideration of the legal structure of the entity. If the shareholders chose to incorporate their business, they can no longer claim they function as a "partnership." The incorporation renders the business a "covered entity" that is subject to federal laws that prohibit unlawful employment discrimination. This is known as the *Hyland* approach, which will be discussed in more detail below.

The second approach is the economic realities test, which requires courts to examine a number of variables to determine whether the shareholders are controlling the corporation or are under its control. Shareholders who participate in setting firm policy, contribute to its capital and are compensated based on its profits share

the attributes of being partners. These partners are not counted as employees for purposes of establishing coverage as a "covered entity" under various civil rights laws. The economic realities test rejects the legal structure of the organization as a basis for determining if a shareholder is a partner or employee.

In the instant case, the lower court applied the *Hyland* approach because the shareholders voluntarily organized as a corporation. Consequently, the court concluded that Petitioner had 15 or more employees by counting the physician-shareholders, who were actively engaged in the day-to-day business, as employees. The court therefore determined that the Petitioner was a "covered entity" under the ADA.

Petitioner advocates that courts should not consider the corporate structure of their medical practice, but should instead apply an economic realities test to determine if the physician-shareholders are to be counted as employees of their professional corporation. *Amici* maintain that the economic realities test should not be applied to a professional corporation because the shareholders made a voluntary choice to incorporate and thereby accepted the benefits and liabilities which follow from electing to incorporate. Since the Petitioner chose to organize as a corporation, it cannot legally claim it operates as any other type of entity. To allow otherwise would enable professional corporations to take advantage of many liability and tax advantages which are unavailable to entities that operate as true partnerships, while disclaiming the corporate form to evade federal anti-discrimination laws.

If an employer has incorporated, then courts should apply the *Hyland* test to determine the existence of an employer-employee relationship between the shareholder

and the corporation. The elements of an economic realities test will not measure whether a shareholder of a corporation is an "employee" for purposes of coverage under the ADA and other anti-discrimination statutes. However, courts should apply the fact intensive economic realities test when the employer is not a corporation and claims that it operates as a partnership. If the employer asserts it is a partnership, the elements of an economic realities test become more practical to demonstrate that a shareholder has an employment relationship with the entity.

The parties to this case have agreed that the Petitioner had legally incorporated and was operating as a corporation during the relevant time period. The physician-shareholders were also directors who accepted their employment relationships with the corporation by signing employment agreements. Since the corporation chose to retain its physician-shareholders as employees, these individuals must be counted as "employees" for purposes of coverage under the ADA.

ARGUMENT

SHAREHOLDERS OF A PROFESSIONAL CORPORATION ARE "EMPLOYEES" WHEN THE EMPLOYER HAS INCORPORATED AND THE SHAREHOLDERS ASSUME TRADITIONAL EMPLOYEE RESPONSIBILITIES WITHIN THE ORGANIZATION

Under the ADA, a "covered entity" may not discriminate against a qualified individual with a disability on the basis of that disability. 42 U.S.C. § 12112(a). A "covered entity" includes an "employer" defined as "a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year." 42 U.S.C. § 12111(5)(A). An "employee" is defined as "an individual employed by an employer." 42 U.S.C. § 12111(4).

In the courts below, Deborah Anne Wells (Wells or Respondent) argued that Clackamas Gastroenterology Associates, P.C. (Clackamas or Petitioner) employed 15 or more employees by counting the physician-shareholders as employees. In response, Clackamas contended it was not a "covered entity" under the ADA because the physician-shareholders were functioning as partners of a professional corporation and should not be counted as employees. The resolution of the case now hinges on whether the physician-shareholders, who are actively engaged in the day-to-day work of their practice, should be counted as "employees" or "partners." If these shareholders are counted as employees, the number of employees will exceed the number required for ADA coverage. However, if the physician-shareholders are considered partners, Wells cannot demonstrate that Clackamas is a "covered entity" and cannot go forward with her case.

Traditionally, courts have considered two distinct approaches to determine whether a shareholder in a professional corporation is an "employee." Under the first approach, the legal structure of the entity dictates whether a shareholder, when that shareholder is actively involved in the daily operations of the corporation, is an "employee." The substantive legal obligations of the employer follow from its decision to incorporate. If a group of professionals choose to incorporate, they cannot later claim they are a partnership to shield the corporation from liability related to unlawful employment discrimination. The use of the corporate structure precludes the corporation from asserting it is a partnership when a federal anti-discrimination lawsuit is filed. The first

approach was adopted by the majority opinion below. *Wells v. Clackamas Gastroenterology Assoc.*, 271 F.3d 903 (9th Cir. 2001). *See also Hyland v. New Haven Radiology Assoc.*, 794 F.2d 793 (2nd Cir. 1986).

The second approach requires that courts ignore the legal structure of the business and determine whether an individual functions more like a partner of the entity. Known as the "economic realities test," courts look at the extent to which shareholders manage and own the entity. Under the economic realities test, shareholders are not counted as "employees" if they participate in setting firm policy, contribute to the firm's capital, are liable for debts and are compensated based on its profits. *Devine v. Stone, Leyton & Gershman, P.C.*, 100 F.3d 78, 80-81 (8th Cir. 1996), *cert. denied*, 520 U.S. 1211 (1997); *Simpson v. Ernst & Young*, 100 F.3d 436 (6th Cir. 1996), *cert. denied*, 520 U.S. 1248 (1997); *Serapion v. Martinez*, 119 F.3d 982, 987 (1st Cir. 1997), *cert. denied*, 522 U.S. 1047 (1998). Under these circumstances, the shareholders are treated as partners, and partners may not be counted as "employees" for purposes of establishing an entity's coverage under the ADA and other federal anti-discrimination statutes. *Hishon v. King & Spalding*, 467 U.S. 69 (1984). This second approach was adopted by the dissenting opinion below. *Wells*, 271 F.3d at 906.

Courts applying the "economic realities" analysis consider multiple factors to determine whether an individual is a partner or an employee. These courts ignore the organization's voluntarily adopted legal structure and look at the facts of each particular case to determine whether a partner is functioning as an employee of the partnership. *Fountain v. Metcalf, Zima & Co.*, 925 F.2d 1398, 1400-01 (11th Cir. 1991); *Serapion*, 119 F.3d at 987.

Courts adopting the *Hyland* test reject the economic realities test because it fails to consider the voluntary choice and legal commitment made by the shareholders to organize the entity as a corporation. In *Hyland*, the Second Circuit recognized that many professional corporations have the attributes of partnerships but may, nevertheless, elect to organize as corporations to take advantage of important tax and employee benefits that are not otherwise available to partnerships. *Hyland v. New Haven Radiology Assoc.*, 794 F.2d 793, 798 (2nd Cir. 1986). In addition, the shareholders of a professional corporation may choose the form of a corporation to avoid personal liability for the wrongful acts of the corporation. "Because the decision to incorporate is presumably a voluntary one, there is no reason to permit a professional corporation to secure the 'best of both worlds' by allowing it to assert its corporate status in order to reap the tax and civil liability advantages and to argue that it is like a partnership in order to avoid liability for unlawful employment discrimination." *Wells v. Clackamas Gastroenterology Assoc.*, 271 F.3d 903, 905 (9th Cir. 2001).

Despite the advantages and disadvantages of both approaches, courts have split on whether to apply either test to a professional corporation. In some instances, the *Hyland* approach is applied to evaluate whether a shareholder is an employee of a professional corporation. *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529 (2nd Cir. 1996). In other instances, courts apply the economic realities test to make that determination. *Devine v. Stone, Leyton & Gershman, P.C.*, 100 F.3d 78 (8th Cir. 1996), *cert. denied*, 520 U.S. 1211 (1997); *Fountain v. Metcalf, Zima & Co.*, 925 F.2d 1398 (11th Cir. 1991).

Amici maintain that the legal structure adopted by the entity should determine the type of test to apply in as-

certaining the status of the shareholder. If the employer in question is a corporation, the court should apply the *Hyland* approach to determine if a shareholder is an employee. If the employer is a partnership, a court should apply the economic realities test.

A. Courts Should Apply the *Hyland* Approach to a Corporation to Determine Whether a Shareholder, Who Is a Director Actively Involved in the Operation of the Business, Should Be Counted As an Employee

The *Hyland* test, rather than the economic realities test, should be applied when the shareholders voluntarily elect to create a corporation. By incorporating, the shareholders have chosen to insulate themselves from personal liability for the actions of the enterprise. They have chosen to have their compensation paid by the corporation, not by the profits of the enterprise. They have also chosen to relinquish their ownership rights in the name of the corporation. The characteristics commonly associated with a partnership do not exist with a corporation. Since the economic realities test examines those elements associated with a partnership, the test is not an appropriate inquiry for a corporation.

The *Hyland* approach is a more suitable test to evaluate employee status in a professional corporation. In *Hyland*, the employer organized as a professional corporation consisting of five physician-shareholders. The shareholders shared many attributes of partners who contributed capital and divided profits and losses evenly. Yet, they also signed separate two-year employment agreements with the corporation and agreed to be compensated at $60,000.00 annually subject to withholding

tax. Moreover, there was further provision that each physician was required to be a "full-time employee of the company" and turn over all compensation earned for providing professional services of any kind. *Hyland*, 794 F.2d at 795. Despite these characteristics, the firm argued it was not a corporation but more like a partnership and that Hyland was not an employee as defined under the ADEA. The Second Circuit rejected this argument for several reasons. First, the court recognized that while it was true that shareholders of certain professional corporations may have many attributes of partners, it was also true that partnerships organize as corporations to take advantage of tax and employee benefits not otherwise available to a partnership. *Id.* at 798. As the court observed, "those who own shares in a corporation may or may not be employees, [however] they cannot under any circumstances be partners in the same enterprise because the roles are mutually exclusive." *Id.* Under these circumstances, the court concluded there was no reason to ignore the corporate structure of the organization where that structure was freely chosen and established by the shareholders even though the firm shared many attributes as a partnership. *Id.*

More recently, the Tenth Circuit rejected an argument similar to that raised by the Petitioner and the Government involving a closely held corporation. In *Trainor v. Apollo Metal Specialties, Inc.*, 2002 U.S. App. LEXIS 25654 (10th Cir. Dec. 13, 2002), the question before the court was whether a shareholder-director of a closely held corporation should be counted as an "employee" to establish coverage under the ADA. The defendants relied on cases which held that a partner in a partnership was not an employee under Title VII of the Civil Rights Act of 1964, and argued there was little difference between a

shareholder in a closely held corporation and a partner in a partnership to be counted as an "employee." Disagreeing with this argument, the court reasoned that defendants "ignore[d] a hallmark distinction between shareholders and partners, and the differing liability each bears for their entity's duties and obligations." *Id.* at *8. Further, the court distinguished between the economic realities of partnerships and corporations by reasoning ". . . while employees do not assume the risks of loss and the liabilities of their employers, partners are liable for partnership debts and obligations." *Id.*, *citing Wheeler v. Hurdman*, 825 F.2d 257, 274-75 (10th Cir. 1987). For these reasons, the court refused to apply an economic realities test, but instead relied on authorities which addressed whether an employer-employee relationship existed between the shareholder-director and a corporation. *Trainor*, 2002 U.S. App. LEXIS 25654 at *9. The court applied a three-factor test to make this determination: (1) whether the director had undertaken traditional employee duties; (2) whether the director was regularly employed by a separate entity; and (3) whether the director reported to someone higher in the hierarchy. *Id.* The court ultimately concluded there was sufficient evidence that the director had an employment relationship with the corporation in which he performed services and was paid for those services, and appropriately considered him an "employee" for coverage under the ADA. *Id.* at *10.

In the present case, Clackamas consisted of four shareholders who were directors of the corporation. Clackamas bestowed employee status on these physician-shareholders by asking them to sign employment agreements, and as directors, the physician-shareholders entered into an employment relationship with the entity. Although they were also corporate directors, several courts have held

that corporate directors may be considered employees depending upon their positions and responsibilities with the corporation. *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529, 1538-39 (2nd Cir. 1996); *EEOC v. First Catholic Slovak Ladies Ass'n.*, 694 F.2d 1068, 1070 (6th Cir. 1982), *cert. denied*, 464 U.S. 819 (1983). Here, the lower court properly found that the Clackamas physician-shareholders were employees because:

> During the relevant period, in addition to being shareholders and directors of Clackamas, the four physician-shareholders actively participated in the management and operation of the medical practice and literally were employees of the corporation under employment agreements.

Wells, 271 F.3d at 906.

Furthermore, the *Hyland* test is a more appropriate measure to determine whether civil rights laws should apply to a corporation, since the *Hyland* test is arguably the more expansive test which will better protect employee rights. This type of test would be consistent with the broad remedial purposes behind the ADA. *See, e.g.*, 42 U.S.C. § 12101(a). The express statutory language of the ADA confirms the comprehensive, remedial nature of this landmark legislation, which was explicitly directed at eliminating and redressing disability discrimination.[2]

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[2] *See* 42 U.S.C. § 12101(b):

> PURPOSE. —It is the purpose of this chapter—
>
> (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(continued...)

Moreover, as this Court has recently noted, the enforcement scheme of Title I of the ADA is identical to that of Title VII,[3] a nondiscrimination statute whose "broad remedial purposes" have been consistently recognized by this Court.[4]

Because petitioner's shareholders assumed job titles and employment relationships with the corporate entity they had organized, and because the ADA and other civil rights laws are to be applied in an expansive way consis-

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(...continued)

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

[3] *See EEOC v. Waffle House, Inc.*, 534 U.S. 279, 285 (2002) (noting that 42 U.S.C. § 12117 provides for enforcement of the ADA's prohibitions against employment discrimination on the basis of disability through "the same enforcement powers, remedies, and procedures that are set forth in Title VII of the Civil Rights Act of 1964").

[4] *See, e.g., Arizona Governing Comm. for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073, 1090 (1983); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18, 421 (1975); and *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971).

tent with their remedial purposes, these physician-shareholders should be counted as employees for purposes of ADA coverage.

B. The Economic Realities Test Should Only Be Applied to a Partnership to Determine If a Shareholder Should Be Counted As an Employee Under Federal Anti-discrimination Laws

Corporations and partnerships have distinct characteristics in their relationships with shareholders. A corporation and its stockholders are generally treated as separated entities under the law. *Burnet v. Clark*, 287 U.S. 410, 415 (1932). Even if an owner of the corporation is a sole shareholder, his status is distinct from the corporation which has different rights and responsibilities due to its different legal status. *Cedric Kushner Promotions v. King*, 533 U.S. 158, 163 (2001). This Court recently observed while interpreting the RICO statute that the "incorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom are employees." *Id.* at 163. Thus, when stockholders make the choice to incorporate by electing directors and creating bylaws that form a corporation, such acts will not create any liability beyond the assets of the corporation itself. *United States v. Bestfoods*, 524 U.S. 51, 61-62 (1998). The shareholders become insulated from personal liability for any unlawful acts of the corporation.

Partnership law, however, works differently in relation to the shareholders. The Uniform Partnership Act establishes the following characteristics of a partner: (1) unlimited liability (§ 308), (2) the right to share in the

profits and participate in management subject to agreement between the partners (§ 401(b)(f)), (3) the right and duty to act as an agent of the other partners (§ 301), and (4) shared ownership (§ 202). Unif. Partnership Act (1997); *see also Wheeler v. Hurdman*, 825 F.2d 257, 267 (10th Cir. 1987). Unlike corporations, the partnership liability is not limited to the assets of the entity. Instead, judgments obtained for obligations arising out of the common business enterprise can be fully executed against any partner.

Because partnerships and corporations have different legal relationships with their shareholders, the tests used to identify whether a shareholder is an employee should also differ depending on the entity in question. For instance, shareholders of a corporation do not share many of the characteristics of partners in partnerships, such as unlimited liability, the right to share in profits and shared ownership. The factors typically considered in an economic realities test—such as the power to act for the firm and other principals, individual liability and compensation based on the firm's profits—more appropriately determine whether a shareholder is acting as a partner in a partnership. *See Serapion v. Martinez*, 119 F.3d 982, 990 (1st Cir. 1997), *cert. denied*, 522 U.S. 1047 (1998). Such factors resemble the characteristics of a partner described under the Uniform Partnership Act.

Some courts of appeals recognize the above distinction between a partnership and corporation and apply the economic realities test when addressing a partnership. In *Simpson v. Ernst & Young*, the Sixth Circuit rejected the contention that the firm's designation of a shareholder as a partner prevented him from asserting that he was an employee by status so he could pursue an action under

the ADEA and ERISA. A management committee maintained exclusive control over the hiring and firing of employees and unilaterally determined their compensation. Although the plaintiff was designated a partner by his title, he had no authority to vote or share in the firm's profits and losses. The court, utilizing factors often considered under the economic realities test, concluded that the plaintiff did not qualify as a partner for purposes of the ADEA and ERISA. *Simpson v. Ernst & Young*, 100 F.3d 436 (6th Cir. 1996), *cert. denied*, 520 U.S. 1248 (1997).

A similar set of facts was addressed in *Strother v. Southern California Permanente Medical Group*, 79 F.3d 859 (9th Cir. 1996). The defendant was a large medical partnership consisting of 2,000 partners. The plaintiff sued the partnership under a state anti-discrimination statute. The district court held that the plaintiff could not maintain her action because she was a partner in the entity; however, the Ninth Circuit reversed and found that she had no power nor any duty to participate in the management of the firm as a partner in the normal sense. *Id.* at 867-68. Applying the elements commonly used in the economic realities test to a partnership, the court stated, "[c]ourts must analyze the true relationship among partners, including the methods of compensation, the partner's responsibility for partnership liabilities, and the management structure and the partner's role in that management." *Id.*

These two cases demonstrate a consistent and logical analysis for determining whether a shareholder of a partnership is an employee. When there is no dispute that the employer is operating as a partnership, courts should apply the economic realities test to determine whether an individual is an employee, rather than a

partner, for purposes of coverage under the federal anti-discrimination statutes.

CONCLUSION

Courts should regard shareholders as employees when the shareholders make a voluntary decision to incorporate, and assume job titles and an employment relationship with that entity. A court should not apply an economic realities test to a professional corporation because the factors considered thereunder do not apply to determine whether an employment relationship exists between a shareholder and a corporation. Instead, the choice to incorporate should be the predominant factor in determining whether a shareholder is an employee to establish coverage under the ADA and other federal anti-discrimination statutes.

Because the lower court properly determined that the four physician-shareholders in question were employees, the lower court's decision should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

CLACKAMAS GASTROENTEROLOGY ASSOCIATES, P.C.,
Petitioner,

v.

DEBORAH ANNE WELLS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 65 national and international labor organizations with a total membership of approximately 13 million working men and women, files this brief *amicus curiae* in support of Respondent with the consent of the parties as provided for in the Rules of this Court.[1]

STATEMENT

Petitioner Clackamas Gastroenterology Associates, P.C., is an Oregon corporation that provides gastroenterology medical services to its client patients. JA 30. Respondent Deborah Anne Wells was employed by the Petitioner Corporation as a bookkeeper from 1986 until 1997, when her employment was terminated. JA 98.

Respondent Wells filed suit against the Petitioner Corporation in federal court, alleging, *inter alia*, that the Corporation's termination of her employment constituted a violation of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101, *et seq.*

The ADA's anti-discrimination norms cover "employers," and the Act defines the covered employers as persons who have employed "15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year." 42 U.S.C. § 12111(5)(A). The Petitioner Corporation moved for summary judgment on

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[1] No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

Respondent Wells' ADA claim on the ground that the Corporation did not employ the threshold number of employees to be an ADA "employer." JA 85.

In the event, the Petitioner Corporation's defense turned on the disputed ADA "employee" status of four physicians – Dr. Robert Wollmuth, Dr. Jon Mason, Dr. William Ferrin, and Dr. Michael Shellfield. This was so, because the Petitioner Corporation's records established that—*not* counting the physicians—the Corporation had employed at least 14 employees in each of 28 weeks during 1996 and in each of 37 weeks during 1997. JA 55-62.[2]

If, as Respondent Wells contends and the Petitioner Corporation denies, one or more of the physicians is an ADA "employee" of the Petitioner Corporation, the Corporation is an ADA "employer." Conversely, if none of the physicians is an ADA "employee" of the Petitioner Corporation, the Corporation is not an ADA "employer."

In this regard, Respondent Wells points to the following facts: Drs. Wollmuth, Mason, Ferrin and Shellfield provide medical services to the Petitioner Corporation's client patients pursuant to employment contracts with the Petitioner Corporation. JA 66 & 71. The physicians provide these services in the Petitioner Corporation's name, from the Corporation's premises, using the Corporation's equipment. JA 71. The Petitioner Corporation has established standards that govern the physicians' provision of medical services, and, in

[2] The Petitioner Corporation's records show that, putting aside the four physicians, there were 10 weeks in 1996 when the Corporation employed 15 employees and 9 weeks 1997 when the Corporation employed 15 employees. JA 55-62. In addition—and again, not counting the four physicians—there were 18 weeks in 1996 when the Petitioner Corporation employed 14 employees, and 28 weeks in 1997 when the Corporation employed 14 employees. JA 55-62.

this regard, the physicians are supervised by the Corporation's administrator to whom, in the administrator's words, the physicians "officially report . . . as employees." JA 66.

The Petitioner Corporation, in turn, points to the fact that Drs. Wollmuth, Mason, Ferrin and Shellfield are also the Corporation's sole shareholders and its sole directors. JA 29-30.

The district court held that the physicians' roles as shareholders and directors of the Petitioner Corporation precluded them from being "employees" of the Corporation within the meaning of the ADA. JA 89. The court of appeals reversed this ruling and held that the physicians are "employees" within the meaning of the ADA. JA 102.

SUMMARY OF ARGUMENT

I. The Americans with Disabilities Act—in common with numerous federal labor statutes—defines the "term 'employee'" to "mean[] an individual employed by an employer." 29 U.S.C. § 12111(4). Under this Court's decision in *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 325 (1992), where a statute so defines the term "employee," the "presumption [is] that Congress means an agency law definition for 'employee' unless it clearly indicates otherwise." And, nothing in the ADA does "indicate[] otherwise."

Under the common law of agency definition, an individual who is an integral part of an enterprise by virtue of the performance of services on a regular basis that further the enterprise's affairs is a paradigm "employee" of the enterprise. That is true whether the service provider does manual work, skilled technical work or managerial work for the enterprise.

Under the common law definition, the four physicians whose "employee" status is in question here are undoubtedly employees of the Petitioner Corporation. The essence of the

matter is that the physicians perform medical services for the Petitioner Corporation's client patients in the Corporation's name, pursuant to employment contracts with the Corporation.

The fact that the physicians are also the Corporation's sole shareholders and sole directors does not negate their status as common law employees and transform them into nonemployees. The law of corporations presumes that a corporation and its shareholders are separate and distinct, and this is so regardless of whether the corporation has many or few shareholders. Thus, a shareholder may be an employee of the corporation, even if he or she is the sole shareholder.

The common law definition of employee more fully furthers the ADA's statutory purposes of providing comprehensive protection against disability discrimination and clear, consistent anti-discrimination standards than the various alternatives proposed by the United States and the Petitioner Corporation. This is so, in large part, because whether an entity is covered by the ADA norms at all as an "employer" depends upon the number of "employees" the entity employs. Excluding certain common law employees from the category of ADA "employees" would thus artificially reduce both the number of employers covered by the Act, and the number of employees protected by the Act.

II. The United States proposes that the EEOC Compliance Manual "modified common law definition" of employee be substituted for the common law definition. The EEOC Manual's definition treats as nonemployees those individuals who are common law employees and who are also "partners, officers, members of boards of directors, and major shareholders" that "participate[] in managing" the enterprise.

The Government does not even pretend that there is anything in the ADA's statutory language, structure or history that indicates that Congress intended the statutory term "employee" to have a meaning different from the common

law definition of that term. Under *Darden*, this lack of a statutory base for the Government's proposed definition requires its rejection.

To be sure, the Government offers the justification that its proposal is sufficient to provide protection for the "most vulnerable" employees, albeit not for less vulnerable employees. That justification—if it can be taken as one at all—does nothing to square the Government's position with *Darden*. And, the Government does not explain how it furthers the ADA's purpose to restrict the Act's protections to that extent. Indeed, the Government ignores altogether the fact that, as in this case, its restrictive definition of "employee" can cause an entity to fall below the statutory threshold for coverage with the result that many entirely vulnerable employees will be deprived of protection.

III. The Petitioner Corporation seeks to rely on a line of anti-discrimination statute cases—derived from the Seventh Circuit's leading decision in *Burke v. Friedman*, 556 F.2d 867 (7th Cir. 1977)—holding that partners are nonemployees *per se*. The Corporation argues that the physician-shareholders here should be treated as the equivalent of partners and the Corporation as the equivalent of a partnership. The *Burke* line of partnership cases are, however, inapplicable to the corporations context. Those cases rest on the view that, under the law of partnerships, a partnership is, for all purposes, identical with its partners and that the partners are the employer and by definition cannot at the same time be employees. But under the law of corporations, the corporation is for all purposes separate from its shareholders and the corporation, not the shareholders, is the employer of the corporation's employees.

Beyond that fundamental logical fallacy, the Petitioner Corporation's argument by analogy from the *Burke v. Friedman* line of cases suffers from the problem that *Burke* itself is unsound, even in the context of partnerships. Contrary to

Burke, the common law of agency is clear that partners can be the common law employees of their partnership.

ARGUMENT

I. Under the common law of agency, Drs. Wollmuth, Mason, Ferrin and Shellfield are employees of Petitioner Clackamas Gastroenterology Associates, P.C., and the Petitioner Corporation is their employer. Under *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992), it follows that the four physicians are employees of the Petitioner Corporation for purposes of the Americans with Disabilities Act.

A. The ADA—in common with numerous federal labor statutes—defines the "term 'employee'" to "mean[] an individual employed by an employer." 42 U.S.C. § 12111(4). *See, e.g.*, 29 U.S.C. § 203(e)(1) (Fair Labor Standards Act); 29 U.S.C. § 652(6) (Occupational Safety and Health Act); 29 U.S.C. § 630(f) (Age Discrimination in Employment Act); 29 U.S.C. § 1002 (6) (Employment Retirement Income Security Act); 42 U.S.C. § 2000e(f) (Title VII of the Civil Rights Act of 1964). In order to give content to this common statutory definition—which otherwise is "completely circular and explains nothing"—this Court has adopted the "presumption that Congress means an agency law definition for 'employee' unless it clearly indicates otherwise." *Darden*, 503 U.S. at 323 & 325. And, nothing in the ADA's legislative language, structure or background does "indicate[] otherwise."

In the common law of agency, the employer-employee relationship is known as the "master-servant" relationship. *See Restatement (Second) of Agency* § 2, comment d, p. 14 (1958) ("*Restatement*").[3] "A master," by the common law's definition, "is a principal who employs an agent to perform service in his affairs and who controls or has the right to

[3] Except where otherwise noted, all citations are to volume 1 of the *Restatement*.

control the physical conduct of the other in the performance of the service." *Id.* § 2(1), p. 12. "A servant," conversely, "is an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master." *Id.* § 2(2), p. 12. And, in contradistinction to a "servant," an "independent contractor" is one "who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking." *Id.* § 2(3), p. 12.

The "common-law test for determining who qualifies as an 'employee,' . . . contains 'no shorthand formula or magic phrase that can be applied to find the answer.'" *Darden*, 503 U.S. at 323-324, quoting *NLRB v. United Insurance Co.*, 390 U.S. 254, 258 (1968). But, for the set of core situations involving an enterprise and the individuals who, on a regular and continuing basis, "perform service in [the enterprise's] affairs," *Restatement* § 2(1), p. 12, the salient point is this:

> "[P]ersons who are doing things for others are servants if there is [a] very close economic relation and control [between the principal and that person]; and . . . this is true whether or not the persons are primarily engaged to do manual work or to make contracts. Indeed, fully employed but highly placed employees of a corporation, such as presidents and general managers, are not less servants because they are not controlled in their day-to-day work by other human beings. Their physical activities are controlled by their sense of obligation to devote their time and energies to the interests of the enterprise." *Restatement* ch. 7, topic 2, title B, introductory note, p. 479.

The *Restatement* elaborates on the nature of the requisite "close economic relation and control" in the following terms:

> "*[T]he servant is one within the business household of the principal*, whereas the non-servant is on the outside.

> *The servant is, thus an integral part of his master's establishment*; the non-servant aids in the business enterprise but is not a part of it. * * * Primarily, the servant sells his personal services, submitting to control as to his physical activities and the use of his time. The non-servant agent agrees sometimes to render services and sometimes to achieve results, but he does not surrender control over his physical actions. [*F*]*ull time employees of a business are typical of the servant group*, factors, brokers and attorneys at law represent the non-servant type of agents." *Id.* (emphasis added).

The common law definition of the master/servant relationship—and its operative phrase "control or right to control"—thus rests on an assessment of "the closeness of the relation between the one giving and the one receiving the service," *Restatement* § 220, comment a, p. 486, and in particular on whether the service provider functions as an "integral part of . . . the business enterprise," *id.* ch. 7, topic 2, title B, introductory note, p. 479. *See id.* § 219 comment a, p. 82 ("intimacy of relation . . . distinguishes the servant from the non-servant").[4]

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[4] As the *Restatement* adds, there are "marginal situations" in which the person providing services stands in an intermediate relationship to the enterprise:

> "The great mass of persons who act for others but who are not an integral part of the business establishment and who are used as the need arises,—the factor, the broker, the non-resident selling agent, the lawyer—all of such persons who are not under the immediate eye of the head of the business and who normally operate independent enterprises, obviously do not fall within the group of business intimates. Some might, a priori, be put into either the group of servants or the group of independent contractors. Thus, for instance, a person who derives his entire income from the principal and yet who has no duty to act except as he himself desires and who responds to no discipline, such as some traveling salesman working on commission, or truck owners paid by the ton mile, might be put into either category. So, too, there are casual manual workers, the carpenter and plumber, who come only when needed and remain but for a short period. The modern enterprise utilizes all of these and it is in these marginal situations that during the past century and a half it has become essential to develop tests for distinguishing the servant from the non-servant." § 219, comment a, p. 482.

The tests for distinguishing the servant from the non-servant in these marginal situations require, as this Court has noted, that "'all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.'" *Darden*, 503 U.S. at 324, quoting *United Insurance*, 390 U.S. at 258. In this regard, the *Restatement* provides a list of ten factors that are to be considered—"among others"—in distinguishing between the two. *Restatement* § 220(2), pp. 485-486. *See also* Rev. Ruling 87-41, 1987-1 Cum. Bull. 296, 298-299 (listing 20 factors).

This focus on the closeness of the service-provider/service-receiver relation furthers the dual purposes served by the common law definition of the master/servant relationship. *Restatement* ch. 7, topic 2, title B, introductory note, p. 479. The first of these purposes is to delineate the group of persons for whose tortious acts in "the performance of the principal's business" the principal is to be held responsible. *Id.* § 219, comment a, p. 483. The second, and equally important, purpose is to delineate "the group of persons to whom at common law the employer had special duties" with respect to the terms and conditions of their work. *Id.* ch. 7, topic 2, title B, introductory note, p. 479-480.

B. By any measure, Drs. Wollmuth, Mason, Ferrin and Shellfield in performing services on the Petitioner Corporation's behalf stand in a sufficiently close relation to the Corporation to be the Corporation's employees under the common law test.

The Petitioner Corporation provides gastroenterology medical services to its client patients, and the individuals who perform these services on the Corporation's behalf are Drs. Wollmuth, Mason, Ferrin and Shellfield. It is indisputable, then, that the physicians' "work is part of the regular business

of the employer" and is "an incident of the business establishment of the employer." *Restatement* § 220, comments h & i, p. 489. And, the physicians perform these services in the Petitioner Corporation's name, on the Corporation's premises and using the Corporation's equipment. *Id.* § 220, comment l, p. 491. What is more the physicians perform these services pursuant to contracts of employment with the Petitioner Corporation, in conformity with standards established by the Corporation and under the supervision of the Corporation's administrator. *See id.* § 220, comment d, p. 487.

Thus, it is unquestionably the case that if one of the physicians were injured on the Petitioner Corporation's premises as the result of some unsafe working condition, the Corporation would be liable for that harm. *Restatement* § 492 & comment c, vol. 2, pp. 436-437(non-delegable duty to provide reasonably safe working conditions). *See id.* § 528, vol., 2, p. 505 (liability for failure to perform non-delegable duty may be diminished or terminated by statute providing no-fault workers compensation). Likewise, if one of the physicians were to commit a tort in the course of performing medical services on the Petitioner Corporation's behalf, the Corporation would be liable for that wrong. *Id.* § 219(1), vol. 1, p. 481.[5]

In short, the relationship between the Petitioner Corporation and Drs. Wollmuth, Mason, Ferrin and Shellfield is

[5] If the tort involved the rendering of medical services, the Corporation's shareholders would have limited personal liability up to a maximum of $300,000 for each shareholder. Or. Rev. Stat. § 58.185(5). Notwithstanding this limited personal liability, the Corporation would remain liable for the full amount of damage caused by its physician employees with respect to tortious conduct in the course of providing medical services. *Id.* § 58.185(10). With respect to torts not involving medical services, the Corporation's shareholders would have no personal liability. *Id.* § 58.185(11).

such as to make the Corporation responsible to and for the physicians to the same extent that a master is responsible to and for a servant at common law.

C. Against all this it is urged that Drs. Wollmuth, Mason, Ferrin and Shellfield are nonemployees, because, in addition to being the Corporation's common law employees, the physicians are also the sole shareholders and sole directors of the Corporation. The theory is that the physicians' proprietary interest in, and ultimate control over, the Petitioner Corporation is such that the physicians must be treated as identical with the Corporation and thus as the masters of that enterprise who cannot at the same time be its servants.

That theory fails because the common law recognizes an essential difference between a corporate enterprise and its shareholders for purposes of defining the master/servant relationship.

"A corporation and its shareholders are presumed separate and distinct, whether the corporation has many shareholders or only one." 1 W. Fletcher, *Cyclopedia of the Law of Private Corporations* § 14, p. 432 (rev. ed. 1999). *See Restatement* § 14 M, comment a, p. 79 ("A corporation is not the agent of one person, or of a number of persons, who can direct its conduct because holding a majority of its voting shares of stock."). Thus, "a shareholder may also be an employee of the corporation." 1 Fletcher, *Cyclopedia of the Law of Private Corporations* § 30, p. 509. *See Burnet v. Clark*, 287 U.S. 410, 415 (1932). As this Court recently held, it is improper, given these principles, to collapse the identity of a corporation and an employee-shareholder, "even where the employee is the corporation's sole owner." *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001).

The *Cedric Kushner* Court addressed whether "a person who is the president and sole shareholder of a closely held corporation" could be "'a[] person employed by . . . [that] enterprise'" within the meaning of the Racketeer Influenced

and Corrupt Organizations Act. 533 U.S. at 160, quoting 18 U.S.C. § 1961. The Court rejected the argument that there was not a sufficient separation between the corporation and the president-owner for the latter to be treated as a distinct person employed by the corporation. In this regard, the Court explained, in the eye of the law, "[t]he corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status." 533 U.S. at 163.

Applying the common law definition of employee against the background of the law of corporations, it could thus not be more clear that the physicians' ownership interest in the Petitioner Corporation does not preclude treating the physicians—as individuals who are performing services on the Petitioner Corporation's behalf as an integral part of the Corporation's business—as employees of the Corporation.[6]

D. By treating employee-shareholders as ADA "employees," the common law definition of employee advances the ADA's statutory goal of "provid[ing] a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" through "clear, strong, consistent, enforceable [anti-discrimination] stand ards." 42 U.S.C. § 12101(b)(1) & (2).

This is so, in large part, because the number of individuals who are treated as ADA "employees" can determine whether the entity employing those employees is covered by the Act at

[6] To foreshadow a point taken up in the final section of this brief, we note that the common law distinction between ownership of an enterprise, on the one hand, and employment by the enterprise, on the other, is not a unique feature of the law of corporations. Thus, even though "[a] partnership is an association of two or more persons to carry on as co-owners a business," the *Restatement* flatly states that "[w]hen one of the partners is . . . regularly employed in the business, he is a servant of the partnership." *Restatement* § 14 A & comment a, p. 62.

all. Like Title VII of the Civil Rights Act and the Age Discrimination in Employment Act, the ADA covers only entities that have "15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year," 42 U.S.C. § 12111(5)(A), and does not cover entities with a lesser number of employees. Coverage is limited in this fashion "in part because Congress did not want to burden small entities with the costs associated with litigating discrimination claims." *Miller v. Maxwell's International, Inc.*, 991 F.2d 583, 587 (9th Cir. 1993), *cert. denied*, 510 U.S. 1109 (1994). And, the measure by which Congress chose to determine the magnitude of the covered entities is the number of individuals employed by the entity.

Whether some of the individuals who carry out an entity's affairs also own a substantial share of the entity's stock makes no difference whatsoever to the magnitude of the entity's operations measured in this way. To take the instant case, the Petitioner Corporation's operations would be of the same magnitude if, instead of the Corporation's stock being held by the four physicians performing medical services on the Corporation's behalf, the stock was held by three of the physicians and the other physician was not a shareholder. And, as we have noted, treating even one of the four physicians here as an employee of the Petitioner Corporation would be sufficient to bring the Corporation within the ADA's coverage. *See* p. 2, n. 2, *supra*. It makes no sense to classify the Petitioner Corporation as a small entity that not is an ADA employer while treating the hypothetical three-shareholder corporation as a sufficiently large entity to be an ADA employer, when in terms of the ADA coverage measure—the number of individuals who are furthering the corporation's affairs as service providers on its behalf—the two are identical.

In addition to depriving *all* employees of certain entities—including employees who are not shareholders—of the

ADA's protections, a definition of "employee" that excludes employee-shareholders would deprive the excluded employee-shareholders of that protection against unlawful employment discrimination as well. For instance, if one of the four physicians at issue in this case were to become disabled and the Petitioner Corporation were to deny him the sort of reasonable accommodation in performing his work mandated by the ADA, the disabled physician would be subject to precisely the type of employment discrimination the Act is intended to preclude and his status as one shareholder (out of four) would not ameliorate the effects of that discrimination in the least.

II. The United States, joined by the Equal Employment Opportunity Commission (EEOC), argues that the common law definition of employee is *not* the appropriate definition for determining whether Drs. Wollmuth, Mason, Ferrin and Shellfield are "employees" of the Petitioner Corporation within the meaning of the ADA. *See* U.S. Br. 20. The alternative to the common law definition proposed by the Government is the set of definitional rules stated in the EEOC's Compliance Manual for determining whether common law employees who are also "partners, officers, members of boards of directors, and major shareholders" are "employees" within the meaning of the federal anti-discrimination laws. EEOC Compliance Manual § 1 d.

It is dispositive that *Darden* requires rejection of the alternate employee definition proffered by the Government. And, it is also the case that the proffered alternative is so defective in its logic as to require rejection in any event.

A. The EEOC Compliance Manual describes a two-step process for determining whether individuals who are service providers to an enterprise and are also "partners, officers, members of boards of directors, and major shareholders" in the enterprise are statutory "employees." EEOC Compliance Manual § 1.

The threshold step under the EEOC Manual's test is to determine whether the individual in question is an "employee" under the common law definition set out in *Darden*. EEOC Compliance Manual § 1 & n. 71.

Once that threshold has been met, the EEOC Manual's test defines a set of "additional considerations" that must be taken into account "in determining whether an employer-employee relationship exists" with respect to common law employees who are "partners, officers, members of boards of directors, [or] major shareholders" of the employer. EEOC Compliance Manual § 1 d.

In this regard, the EEOC Manual requires consideration of "whether the individual acts independently and participates in managing the organization, or whether the individual is subject to the organization's control." EEOC Compliance Manual § 1d. By reason of this consideration, "[i]n *most* circumstances, individuals who are partners, officers, members, of boards of directors, or major shareholders will *not* qualify as employees," even though those individuals are employees under the common law definition. *Id.* (emphasis added).

The EEOC Manual's definition of "employee" is more restrictive than the common law definition in part because the Manual focuses on "[w]hether the individual reports to someone higher in the organization." EEOC Compliance Manual § 1 d. The common law, by contrast, provides that "highly placed employees of a corporation, such as presidents and general managers, are not less servants because they are *not controlled in their day-to-day work by other human beings*." *Restatement* ch. 7, topic 2, title B, introductory note, p. 479 (emphasis added). Under the common law definition, "managers of great corporations are normally superior servants, differing only in the dignity and importance of their positions from those working under them." *Id.* § 220,

comment a, p. 486. *See also id.* § 2, comment c, p. 14 ("the officers of a corporation . . . are servants equally with the janitor and others performing manual labor").

Beyond that, the EEOC Manual definition adds an element that is entirely foreign to the common law definition—whether the individual in question "participates in managing the organization." EEOC Compliance Manual § 1 d. And, the Manual gives the following example of a person whose participation in management is sufficient to exclude her from statutory protection: "the head of one of the corporation's divisions" who "has the right to vote on decisions taken by [the corporation], although her vote does not count as much as those of other individuals." *Id.* Thus, as the Brief for the United States very aptly puts it, "[t]he heart of the matter" under the EEOC Manual definition "is whether an individual exercises a *degree* of control inconsistent with employee status." U.S. Br. 23 (emphasis added).[7]

B. This is not the first time that the United States has urged a "modified common-law definition of 'employee'" for the purpose of defining the term "employee" in a federal labor statute. *Darden*, 503 U.S. at 325-326. The Government did so in *Darden* for purposes of defining the term "employee" in ERISA. Rejecting the Government's position

[7] Just how limited a "degree of control" can make a common law employee into an anti-discrimination law nonemployee is demonstrated by this case. The Petitioner Corporation is owned by four physician-shareholders. If any one of the physicians is an ADA "employee," the Petitioner Corporation meets the threshold to be an ADA "employer." If ownership and control is equally divided among the four physician-shareholders, any one of them is vulnerable to employment discrimination generated or approved by the other three. And, if ownership and control is not equally divided, at least one of the physicians is even more vulnerable to employment discrimination. Nevertheless, the United States takes the position that, applying the EEOC definition, the record evidence on its face "suggest[s] that petitioner's shareholder-directors may not be employees." U.S. Br. 24.

in that case, the *Darden* Court "adopt[ed] a common-law test for determining who qualifies as an 'employee' under ERISA." *Id.* at 323. In so doing, the Court announced a "presumption" applicable to *all* federal labor statutes "that Congress means an agency law definition for 'employee' unless it clearly indicates otherwise." *Id.* at 325.

The Government does not even pretend that in enacting the ADA Congress "clearly indicate[d] otherwise." Indeed, the United States makes no attempt to identify anything in the language, structure or legislative history of the ADA that would so much as suggest a Congressional intent to provide for an ADA definition of "employee" that departs from the presumptively applicable common law definition.[8]

Instead, the Government seeks to justify such a departure on the theory that the common law definition is not the appropriate ADA definition, because "the common law standard is designed to distinguish between servants and independent contractors for the purpose of determining when an employer is subject to vicarious liability" whereas the purpose of distinguishing between employees and nonemployees here is "to determine who receives protection against discrimination based on a disability." U.S. Br. 20.

The Government's explanation is not an attempt to bring its proffered definition of "employee" within *Darden* but rather a frontal attack on *Darden* that is too feeble to succeed. *Darden*'s point is that unless *Congress* indicates otherwise it is not for the Government or the courts to substitute their own

[8] It is worthy of note that when Congress wishes to cover common law employees generally and at the same time to exclude higher level common law employees from the protected class, it knows how to do so. *See, e.g.*, 29 U.S.C. § 152(2) ("The term 'employee' . . . shall not include any individual . . . employed as a supervisor."). *See also* 29 U.S.C. § 152(11) (defining "supervisor").

statute-by-statute definitions of "employee"—derived from their perception of the statute's general purposes or otherwise—for the common law definition.

While that is dispositive, we would note that the Government's justification is, in any event, based on a plain misunderstanding of the office of the common law definition. One of the two offices performed by the common law definition is precisely to "indicate the relation from which arises . . . the special duties and immunities of an employer to the employee." *Restatement* § 2, comment a, p. 13. *See id.* ch. 7, topic 2, title B, introductory note, pp. 479-480 ("The second purpose in defining the category of servant is to indicate the group of persons to whom at common law the employer had special duties and freedom from liability."). And, among the special duties owed by a master to his servants, as defined by the common law, are those "duties imposed upon him by statute for their protection." *Id.* § 520, p. 487.

The sole justification the Government offers for the particular substitute it proffers here—the EEOC Compliance Manual definition of employee—is, we would add, equally deficient. That justification is that

> "by classifying as non-employees those shareholders, partners, officers, and directors who actually own and manage the business, the EEOC's guidance excludes from protection those who are most able to control the firm's practices and who, as a consequence, are least vulnerable to the discriminatory treatment prohibited by the Act." U.S. Br. 11.

Quite understandably, the Government does not enlighten us as to how it serves the ADA's purpose to "exclude[] from protection those who are"—in any degree—"vulnerable to the discriminatory treatment prohibited by the Act." U.S. Br. 11. "Least vulnerable" or not, the EEOC Manual definition would exclude from the ADA's protection common law

employees who—despite the fact that they "exercise[] a degree of control" over the employing entity, *id.* at 23—are nevertheless subject to employment discrimination of exactly the sort prohibited by the statute.

What is more, as this case so vividly demonstrates, the EEOC Manual's definition strips protection not only from these "least vulnerable" employees but also from many entirely vulnerable employees: Deborah Wells—the plaintiff in this case—was not one of the physician-shareholders, she was a bookkeeper. And, the Manual's definition, if applied here would deprive her—and every other one of the Petitioner Corporation's employees—of the protections of the federal anti-discrimination laws.

It is also to the point that the EEOC Manual's "participates-in-managing" test is, contrary to the Government's assertion, far from "workable." U.S. Br. 17-19. In the first place, the Manual's test admittedly results in a number of individuals who are unquestionably employees for many other purposes, such as pension benefits and workers compensation, being treated as non-employees for purposes of the anti-discrimination laws. Moreover, by requiring a determination of "whether an individual exercises *a degree of control*" that is deemed "inconsistent with employee status," the Manual's standard requires difficult line drawing among higher level common law employees to determine the persons who have sufficient control to provide themselves sufficient protection against employment discrimination to justify their classification as non-employees under the anti-discrimination laws. U.S. Br. 23 (emphasis added). And, the EEOC Manual provides no calculus for determining at what "degree" the line is to be drawn. In both regards, the Manual's "participates in managing" test can only foster the confusion that is the enemy of a workable legal regime.

III. The Petitioner Corporation provides no definition of the statutory term "employee." Instead, the Petitioner Corpo-

ration advances a syllogistic argument for classifying the four physicians whose status is at issue here as non-employees.

The major premise of the Petitioner Corporation's argument is that "those who are properly classified as partners are not 'employees' for purposes of the anti-discrimination statues." Pet. Br. 16. The minor premise is that the physician-shareholders in a closely held professional corporation "are, in reality, partners." *Id.* at 9. And, says the Petitioner Corporation, the conclusion that follows is that the physician-shareholders—like partners—are "not 'employees' under the ADA." *Id.*

There are two fundamental flaws in this argument. The first flaw, which we address immediately below, is that the syllogism's minor premise—that there is a relevant identity between the physician-shareholders and partners—is wrong. The second flaw, which we take up in the final section of this brief, is that the syllogism's major premise—that by definition partners cannot be "employees" of their partnership—is wrong as well.

A. The first difficulty with the Petitioner Corporation's syllogistic argument is that the case law supporting its major premise rests on a purely formal analysis of partnerships and of partnership law that cannot be extended to the corporations context by positing an identity between the physician-shareholders here and partners.

The leading decision for the proposition that an individual who is a partner is a nonemployee *per se* for purpose of the federal anti-discrimination laws—regardless of whether that individual furthers the partnership's affairs by providing services on the partnership's behalf—is *Burke v. Friedman*, 556 F.2d 867 (7th Cir. 1977). *See Hishon v. King & Spalding*, 678 F.2d 1022, 1027-28 (11th Cir. 1982) (citing and following *Burke*), *rev'd*, 467 U.S. 69 (1984); *Wheeler v. Hurdman*, 825 F.2d 257, 262-263 (10th Cir. 1987) (same).

See also Hishon v. King & Spalding, 467 U.S. 69, 79-80 (1984) (Powell, J., concurring).[9]

Burke reaches that conclusion as follows: Title VII "defines an employer in part as a 'person.'" 556 F.2d at 869, quoting 42 U.S.C. § 2000e(b). "The term 'person' is defined in § 2000e(a) as including 'partnerships.'" 556 F.2d at 869. "Therefore, § 2000e is written so as to include partnership as one of the possible 'persons' acting as an employer." *Id.* A "partnership," however, is nothing more than "'an association of two or more persons to carry on as co-owners a business for profit.'" *Id.*, quoting § 6 of the Uniform Partnership Act (1914). And, "[i]n light of the foregoing," said the *Burke* court, it is impossible to "see how partners can be regarded as employees rather than as employers." 556 F.2d at 869.

Burke thus essays a purely formal analysis of partnerships and partnership law. Since the structure of partnerships and the law of partnerships are distinctly different from the structure of corporations and the law of cirporations, the *Burke* analysis is, by its terms, inapplicable in the corporate context.

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[9] Justice Powell's concurring opinion in *Hishon* expressed the view—on a point not addressed in the Court's opinion—that the "relationship among law partners" is not appropriately governed by Title VII on the ground that the "essence of the law partnership is the common conduct of a shared enterprise" that "contemplates that decisions important to the partnership normally will be made by common agreement." 467 U.S. at 79-80. *But see* p. 23 n. 10, *infra*. At the same time, Justice Powell was careful to state that "an employer may not evade the strictures of Title VII simply by labeling its employees as 'partners.'" 467 U.S. at 79 n. 2. The distinction that Justice Powell drew between true partners and titular partners—which is not of the moment here—has spawned considerable debate in the courts of appeals over who is, and who is not, a true partner. *See EEOC v. Sidley Austin Brown & Wood*, ___ F.3d ___, 2002 WL 31387525, pp. *4-*9 & *11-*14 (7th Cir., Oct. 24, 2002).

While *Burke* rests on the proposition that there is a legal identity between a partnership and its partners, the well-settled law of corporations is that "a duly organized corporation enjoys a legal identity separate and apart from its shareholders, directors and officers." 1 Fletcher, *Cyclopedia of the Law of Private Corporations* § 25, p. 476. "The importance of observing these distinctions . . . pervades the whole law of corporations, being fundamental in many of the rules of law." *Id.* at p. 485. That being so, it is well-settled that "a shareholder may also be an employee of the corporation." *Id.* at § 30, p. 509. This "fundamental" aspect of corporate law makes the *Burke* analysis—which rests on an assumed legal identity of a partnership and the partners—inapplicable.

The Petitioner Corporation's point that the physician-shareholders are "in reality partners" fails, because in the only way relevant—whether the physician-shareholders and the Petitioner Corporation are, like the *Burke* partners and partnership, a single legal entity – the physician-shareholders are *not* at all the same as partners. Thus, the Petitioner Corporation's attempt to expand *Burke*'s partner/nonemployee rule into a shareholder/nonemployee rule must be rejected.

B. While the foregoing is sufficient, we would be remise if we did not add that *Burke* and like cases get their common law of agency wrong and are thus unsound under *Darden*. As we have noted, the *Restatement of Agency* recognizes *both* that "[a] partnership is an association of two or more persons to carry on as co-owners a business," *and* that "[w]hen one of the partners is . . . regularly employed in the business, he is a servant of the partnership." *Restatement* § 14 A & comment a, p. 62.

Indeed, the *Restatement* does so even though it states the law of agency at a time when the law of partnerships was grounded in the "aggregate theory" that a partnership is nothing more than an "aggregation of individuals." Uniform

Law Commissioners, *Summary: Uniform Partnership Act (1994)*, http://www.nccusl.org/nccusl/uniformact_summaries, p. 2 (11/19/02). *See* D. Weidner & J. Larson, *The Revised Uniform Partnership Act: The Reporters' Overview*, 49 Bus. Law. 1 (1993). The "aggregate theory" itself has since been repudiated in favor of the "entity theory," and reflecting that change the Revised Uniform Partnership Act provides that "[a] partnership is an entity distinct from its partners." RUPA § 201(a) (1997). This change reinforces the *Restatement*'s understanding of the relation between a partnership and its partner-employees and by so doing further undermines *Burke*.[10]

Burke is thus wrong even in the partnership context. Certainly there is no reason to compound *Burke*'s error by extending its reach to the dissimilar corporations context.

There is, in sum, nothing to the analogy of the physician-shareholders to partners which forms the sole support for the Petitioner Corporation's claim that the physicians are not "employees" within the meaning of the ADA.

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[10] The premise that partnerships are by their nature collegial decision-making bodies—which served as the basis for Justice Powell's doubts about the applicability of Title VII to relations among partners, *Hishon*, 467 U.S. at 79-80—is undermined by the Revised Uniform Partnership Act, which provides that "right to participate in the management of the partnership" can be waived by a "contrary agreement." RUPA § 401, comment 7. *See* RUPA § 103(a) ("[R]elations among the partners and between the partners and the partnership are governed by the partnership agreement.").

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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IN THE
Supreme Court of the United States

CLACKAMAS GASTROENTEROLOGY ASSOCS., P.C.,

Petitioner,

v.

DEBORAH ANNE WELLS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW; AARP; ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND; NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM; NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES; AND PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, INC., AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST

The *amici* submit this brief with consent of the parties, in support of the Respondent's argument that the Ninth Circuit properly held that the four physician shareholders, who actively perform medical services on behalf of Clackamas Gastroenterology Associates, are employees for purposes of determining whether Clackamas is large enough to be deemed an employer under the Americans with Disabilities Act of 1990 ("ADA").[1] *See* 42 U.S.C. § 12111(5)(A).

The Lawyers' Committee for Civil Rights Under Law is a tax-exempt, nonprofit civil rights organization that was founded in 1963 by the leaders of the American bar, at the request of President John F. Kennedy, in order to help defend the civil rights of minorities and the poor. Toward that end, the Lawyers' Committee has been continually involved as *amicus curiae* in cases before this Court involving the proper scope and coverage afforded to federal civil rights laws prohibiting employment discrimination.

AARP is a nonprofit membership organization serving more than thirty-five million persons age 50 and older that is dedicated to addressing the needs and interests of older Americans. Approximately 45 percent of AARP members are employed, and many of these rely on the ADA to assure access to workplaces free from discrimination. AARP has filed numerous *amicus* briefs before this Court concerning interpretation of the ADA and other federal laws securing equal employment opportunity.

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[1] Counsel for *amici curaie* authored this brief in its entirety. No person or entity other than *amici curaie*, their staff, or their counsel made a monetary contribution to the preparation of submission of this brief. Letters of consent to this filling of this brief have been filed with the Clerk of the Court pursuant to Supreme Court rule 37.3.

The Asian American Legal Defense and Education Fund ("AALDEF"), founded in 1974, is a nonprofit tax exempt organization that advances and defends the civil rights of Asian American nationwide. AALDEF litigates cases involving employment discrimination and labor rights, immigrant rights, and voting rights. AALDEF has also represents and provided legal assistance to victims of anti-Asian violence as well as persons who assert claims of employment discrimination based on age or disability. AALDEF joins this *amici curaie* brief because of the important issues in this case that will define the scope and coverage of major civil rights statutes affecting Asian Americans.

The National Asian Pacific American Legal Consortium ("NAPALC") is a national nonprofit, nonpartisan organization whose mission is to advance the legal and civil rights of Asian Pacific Americans. Collectively, NAPALC and its Affiliates, the Asian Law Caucus and the Asian Pacific American Legal Center of Southern California, have over 50 years of experience in providing legal public policy, advocacy, and community education on discrimination issues. NAPALC and its Affiliates have a long-standing interest in employment discrimination and civil rights issues that have an impact on the Asian Pacific American community, and this interest has resulted in NAPALC's participation in a number of amicus briefs before the courts.

The National Association for the Advancement of Colored People ("NAACP"), established in 1909, is the nation's oldest civil rights organization. The NAACP has state and local affiliates throughout the nation, including the State of Maryland where it maintains its national headquarters. The fundamental mission of the NAACP

includes promoting equality of rights, eradicating caste and race prejudice among the citizens of the United States and securing for African Americans and other minorities increased opportunities for employment. The NAACP has appeared before courts throughout the nation in numerous important civil rights cases, including employment cases.

The National Partnership for Women & Families ("National Partnership") is a national advocacy organization that develops and promotes policies to help women achieve equal opportunity, quality health care, and economic security for themselves and their families. Since its founding in 1971, the National Partnership (formerly the Women's Legal Defense Fund) has worked to advance equal employment opportunities by monitoring agencies, EEO enforcement, challenging employment discrimination in the courts, and leading efforts to promote employment policies such as the Family and Medical Leave Act and the Pregnancy Discrimination Act.

The Puerto Rican Legal Defense and Education Fund, Inc. ("PRLDEF") is a national non-profit civil rights organization founded in 1972. PRLDEF is dedicated to protecting and furthering the civil rights of Puerto Ricans and other Latinos through litigation and policy advocacy. Since its inception, PRLDEF has participated both as direct counsel and as *amicus curiae* in numerous cases throughout the country concerning the proper interpretation of the civil rights laws, including federal employment discrimination statutes. The resolution of this case will have significant impact upon the extent to which PRLDEF and other civil rights organizations can protect the rights of their constituencies.

An employer is covered by Title I of the ADA when it has fifteen or more employees. 42 U.S.C. § 12111(5)(A).

The precise issue in this case is whether shareholders and directors of a professional corporation should be counted as employees for purposes of triggering coverage under the ADA when they actively perform professional services on behalf of the professional corporation. Although this case deals with an analysis of who can be sued under the ADA, the Court's interpretation of who constitutes an "employee" has much broader implications. Because other federal anti-discrimination statutes contain similar language defining the terms "employee" and "employer," this Court's determination will also affect cases brought under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e(b), and the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 630 (b).

Moreover, this case conceivably impacts the issue of who can sue, as suggested by the Government's brief. Government Brief ("Gov't. Br.") at 2. Further, because the damages provisions under several of these statutes are linked to the number of employees, the outcome of this case could affect what level of damages may be assessed against a discriminating employer. *See* 42 U.S.C. § 1981a(b)(3). Accordingly, this case is of exceptional importance to the interpretation and enforcement of various federal civil right laws, and to the rights of the clients and communities served by the *amici*.

SUMMARY OF ARGUMENT

The judgment of the Ninth Circuit Court of Appeals should be affirmed because it acknowledges Clackamas Gastroenterology Associates' ("Clackamas" or "Petitioner") decision to avail itself of the legal rights and liability shields associated with a professional corporation, and appropriately treats a professional corporation as a legal entity separate and distinct from a partnership in determining that the four

physician shareholders are employees of Clackamas. *See Wells v. Clackamas Gastroenterology Assocs., P.C.*, 271 F.3d 903 (9th Cir. 2001). Consistent with the approach articulated by the Second Circuit in *Hyland v. New Haven Radiology Assocs., P.C.*, 794 F.2d 793 (2d Cir. 1986), and as more precisely refined by the Tenth Circuit's decision in *Trainor v. Apollo Metal Specialties, Inc.*, No. 01-5077, 2002 U.S. App. LEXIS 25654 (10th Cir. December 13, 2002), the proper inquiry in determining whether a shareholder or director is an employee of a professional corporation is whether the shareholder or director performs traditional employee duties for the professional corporation.[2]

The Petitioner's "economic realities" test and the Government's multi-factored test both rest on the mistaken theory that professional corporations are legally indistinguishable from partnerships, and as such, the four doctors should be treated as partners, rather than employees of a corporation.[3] As the Ninth Circuit correctly recognizes, such theories ignore the established legal differences in both state law and federal law between corporations and partnerships. *See Clackamas*, 271 F.3d at 905. Moreover, both Clackamas and the Government improperly characterize the Ninth's Circuit's decision as one that merely exalts "form over substance."[4] Petitioner's Brief ("Pet. Br.")

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[2] This or a comparable analysis has been adopted by the Second, Ninth, and Tenth Circuits. For ease of reference, it is simply referred to as the "*Trainor* approach" throughout the brief.

[3] The Petitioner's "economic realities" test has been employed by courts in distinguishing between employees and independent contractors. The independent contractor analysis is not helpful, however, in resolving the issue presented here. *See infra* at section 2.

[4] Indeed, if any argument exalts form over substance, it is the Petitioner's, which seeks to have the Court ignore the substantive legal entity chosen by an employer, and instead focus on whether the shareholders/directors believe themselves to be more like "partners."

at 11. To the contrary, it is the legal form of the business that dictates the substantive rights and liabilities associated with that business. As observed by three circuits, choosing to incorporate under state law allows the corporate employer to seek the substantial tax advantages, significant insulation from personal liability, and employee benefits otherwise not available to other business entities. *See id.*; *Hyland,* 794 F.2d at 798; *Trainor, 2002 U.S. App. LEXIS 25654 at *26.*

Indeed, the "economic reality" in choosing to incorporate includes significant financial benefits -- a fact ignored in both the Petitioner's and Government's briefs.[5] Further, the *Trainor* approach is consistent with this Court's recent recognition that "incorporation's basic purpose is to create a distinct legal entity, with *legal rights, obligations, powers and privileges* different from those of the natural individuals who created it, who own it, or whom it employs." *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001) (emphasis added).

Here, because the four physician shareholders/directors performed professional medical services for the corporation through their employment agreements with the corporation, the Ninth Circuit properly treated them as employees of the corporation. Even where the employment relationship is not as obvious, the Tenth Circuit's *Trainor* decision, which employs a three-part test, demonstrates that the appropriate focus is whether a shareholder or director performs traditional employee duties for the corporation. The *Trainor* court relied on the

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5 While the Petitioner touts its theory as one that takes into account the "economic reality" of a corporation, it ignores the paramount economic reality—the legal structure under which the employer chooses to operate.

following factors; "1) whether the director has undertaken traditional employee duties; 2) whether the director was regularly employed by a separate entity, and 3) whether the director reported to someone higher in the hierarchy." *Trainor*, 2002 U.S. App. LEXIS 25654 at *27. Thus, even where, as here, the shareholders in question have employment contracts with the professional corporation in which they have invested, the substance of their employment activities and their relationship with the entity, not their title, governs the analysis as to whether they are an employee.

Finally, not only is the *Trainor* approach consistent with the general notion that anti-discrimination statutes are remedial in nature and must be given a liberal interpretation in order to effectuate their purposes, but it is also a bright line test that injects certainty into the administration of the various anti-discrimination statutes. *See Walters v. Metro. Educ. Enter. Inc.*, 519 U.S. 202, 211 (1997) (rejecting an approach for defining "employee" under Title VII that would "turn [the] coverage determination into an incredibly complex and expensive factual inquiry"). The Petitioner's and the Government's approach would create an untenable case by case, employer by employer, employee by employee analysis.

ARGUMENT

THE APPROPRIATE ANALYSIS IN DETERMINING WHETHER A SHAREHOLDER OR DIRECTOR IS AN EMPLOYEE OF A PROFESSIONAL CORPORATION IS WHETHER THEY PERFORM TRADITIONAL EMPLOYEE DUTIES FOR THE PROFESSIONAL CORPORATION

The language of the ADA does not resolve the issue of whether shareholders and directors of a professional corporation are appropriately regarded as employees.[6] *See Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 322 (1992) (noting that such "definition is completely circular and explains nothing"). Given the ambiguity of the statute, it is appropriate to look beyond the statute for construction of it. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). The *Trainor* approach provides an appropriate analytical framework for making this determination. As discussed below, the Petitioner's theory as well as the Government's theory, which allows an employer to escape coverage from the civil right laws by disavowing their chosen business structure, is not supported by federal law generally, Oregon's state law, or the legislative intent of the relevant statutes. Moreover, and perhaps most significant, adopting either the Petitioner's or the Government's approach would as a practical matter turn what should be a straightforward analysis into a case by case factually intensive determination.

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[6] The ADA defines employee as "an individual employed by an employer." 42 U.S.C. § 12111(4). An "employer," in turn, is defined as a "person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year." *Id.* at § 12111(5)(A).

1. A Professional Corporation Is A Legal Entity Separate And Distinct From A Partnership.

The Petitioner's and the Government's arguments are fatally flawed because they erroneously contend that the Ninth Circuit's decision, following the Second Circuit's approach in *Hyland*, merely exalts form over substance. *See* Pet. Br at 10-11; Gov't. Br. at 14. Rather than elevating form over substance, however, the Ninth Circuit correctly recognized that the legal form of an employer controls the substantive legal rights of the business entity chosen by the employer. *Clackamas*, 271 F.3d at 905; *Hyland*, 794 F.2d at 798. Recently, this Court recognized the substantive legal importance of the chosen business entity. In *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158 (2001), a case brought under the Racketeer Influenced and Corrupt Organization Act ("RICO"), this Court addressed the issue of whether the president and sole shareholder of a closely held corporation, was separate and distinct from the corporation itself. In finding that the corporation's sole owner and the corporation itself were indeed different legal entities, this Court held that "incorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs." *Cedric*, 533 U.S. at 204; *see also Burnet v. Clark*, 287 U.S. 410, 415 (1932).[7]

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[7] The Petitioner is effectively arguing that the professional corporation and the four physicians are the same legal entity, i.e. both the "employer," for purposes of the ADA. That analysis, however, ignores the "distinctness" principle of corporate law, recognized by this Court. *See Cedric*, 533 U.S. at 163. Because Clackamas and the four physician shareholders/directors are separate and distinct legal entities, they cannot both be the "employer" for purposes of ADA. Rather, the professional corporation itself is the employer and the physicians who are active shareholders are simply its employees.

The substantive rights associated with a professional corporation establish that a professional corporation is separate and distinct from a partnership.[8] For example, choosing to incorporate allows that corporation the ability to seek substantial tax advantages, and employee benefits otherwise not available to other forms of business entities. *See Clackamas*, 271 F.3d at 905; *Hyland*, 794 F.2d at 798; 1 W. Fletcher, *Cyclopedia of the Law of Private Corporations* § 20 (rev. ed. 1999). Perhaps more significant, the legal form chosen by the employer provides a corporate shield for all shareholders and directors under the corporate umbrella from all forms of personal liability except for their own malpractice. OR. REV. STAT. § 58.185(3); 1 Fletcher, § 20; UNIFORM PARTNERSHIP ACT, § 15 (1994). Further, even if malpractice is committed while performing services for the professional corporation, the professional shareholder's liability is capped –a limitation on liability not traditionally granted to partnerships. OR. REV. STAT. § 58.185(5)-(9). In other words, the four physicians in this case are not at risk in their personal capacities for the "non-malpractice" liabilities of the corporation and their risk for the malpractice claims of each other are limited, claims that could result in multi-million dollar malpractice lawsuits. *See id.* This corporate

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[8] The Government asserts that their multi-factored test should be accepted because it applies to partnership issues as well. Gov't. Br. at 12-13. The question of if, and when, partners are employees under the anti-discrimination laws is not before this Court. Instead, because Clackamas is a professional corporation, the issue is whether shareholders-directors, who perform services for the corporation, are employees of the corporation for purposes of ADA coverage. Indeed, because of the inherent legal and practical differences between partnerships and corporations (as discussed *infra*), it may be inappropriate to have the same test, as the Government suggests, apply to both. *See Clackamas*, 271 F.3d at 905. In any event, because the issue of when a partnership is a covered entity is not before the Court, the Court need not address that issue.

shield from liability alone is perhaps the most important "economic reality" associated with the professional corporation—a fact that both the Petitioner's and Government's briefs ignore in labeling the Ninth's Circuit decision as one that emphasizes "form over substance." Pet. Br. at 11; Gov't Br. at 15-16.

Additionally, the Petitioner's argument, advocating for the "economic realities" test, rests on the mistaken theory that professional corporations are legally indistinguishable from partnerships, and as such, the four doctors should be treated as partners, rather than employees of a corporation. As the Ninth, Second and Tenth Circuits correctly recognize, such a theory ignores the well established and significant legal differences under state law and federal tax laws between corporations and partnerships. *See Wells*, 271 F.3d at 905; *Hyland*, 794 F.2d at 798; *Trainor, 2002 U.S. App. LEXIS 25654 at *26*. Although a professional corporation may operate in a fashion similar to a partnership, that does not negate the fact that a professional corporation is organized under the color of state law as a corporation, nor does it negate the fact that special tax advantages are given to a corporation under federal tax code. *See id.*; *see also Gorman v. North Pittsburgh Oral Surgery Assocs., Ltd.*, 664 F. Supp. 212, 214 (W.D. Pa. 1987); *Johnson v. Cooper, Keans & Cargill, P.A.*, 884 F. Supp. 43, 45 (D. N.H. 1994) (declining employer's "invitation to ignore legal reality in deference to economic reality"). Indeed, the Petitioner, in discussing the historical origins of professional corporations, recognizes the employee benefits and tax breaks associated with incorporation. *See* Pet. Br. at 12-13.

The courts, in interpreting the federal revenue statute, have uniformly rejected an argument virtually identical to the Petitioner's—that shareholders of a professional corporation should be viewed as partners rather than

employees. *See Kurzner v. United States*, 413 F.2d 97, 107-108 (5th Cir. 1969); *O'Neil v. United States*, 410 F.2d 888, 899 (6th Cir. 1969); *United States v. Empey*, 406 F.2d 157, 168-170 (10th Cir. 1969); *see also Foglesong v. Comm'r of Internal Revenue*, 691 F.2d 848, 851 (7th Cir. 1982). In these cases, the federal government attempted, through regulations, to deny employee status to taxpayers who were shareholders, officers, and salaried employees of professional corporations. The courts of appeals, however, uniformly rejected the federal regulations that purportedly permitted the Internal Revenue Service to ignore the corporate structure for tax purposes.[9] *See id.*; *see, e.g., Epperson v. United States*, 490 F.2d 98, 99 (7th Cir. 1973). Because the courts of appeals have rejected the argument that professional corporations are like partnerships for federal tax purposes, that very same argument for purposes of avoiding liability under the anti-discrimination statutes should likewise be rejected.

Notwithstanding Petitioner's explicit recognition of the unique tax benefits and employee benefits associated with a professional corporation, Clackamas argues that certain characteristics of the Oregon Professional Corporation Statute require that it be treated more like a partnership for ADA purposes. For example, the Petitioner asserts that like a partnership, the shareholder must remain personally liable for any malpractice; that such shareholders must be licensed; and that special rules apply to professional corporations that practice medicine. *See* Pet. Br. at 14-15.

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[9] Indeed, shortly after these cases were decided, the Internal Revenue Service issued guidance that provides, "a professional service organization formed and operated under the Professional Service Corporation Act of a state listed in Rev. Rul. 70-101 is considered a corporation for Federal income tax purposes." Rev. Rul. 77-31, 1977-1 CB 409. Oregon is listed as one of the states to which this IRS's rule is applicable.

These state law provisions, however, exist for purpose of protecting the public from the unlicensed practice of medicine and to provide victims of malpractice with the appropriate recourse against physicians who have been negligent.[10] These provisions do not provide, nor do Petitioners point to, any rational basis for excluding physicians who provide medical services on behalf of the corporation from an assessment of the size of the professional medical corporation for purposes of the ADA, or any other anti-discrimination statute.

Here, the four physicians do not deny that they are by express written agreement "employees" of Clackamas, but instead argue that their employee activities and functions should be ignored because they believe they are like partners, and thus not employees, for purposes of ADA coverage. Justice Powell in his concurring opinion in *Hishon v. King & Spalding*, 467 U.S. 69 (1984), however, warned that "an employer may not evade the strictures of Title VII simply by labeling its employees as 'partners.'" *Id.* at 80 n.2. Here, that is precisely what Clackamas attempts to do — assert that the physicians are like "partners" to evade the obligations of the ADA. As the Ninth Circuit succinctly summarized, "there is no reason to permit the professional corporation to secure the 'best of both possible worlds' by allowing it both to assert its corporate status in order to reap the tax and civil liability advantages and to argue that it is like a partnership in order to avoid liability for unlawful employment discrimination." *Clackamas*, 271 F.3d at 905; *see also Hyland*, 794 F.2d at 798.

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[10] From a larger perspective, it is clear that these provisions are intended to insure that the malpractice liabilities remain personal to the professional. They were not intended to allow the organization to disavow its corporate structure merely because it may be in the Corporation's financial interest to do so.

2. The Proper Inquiry In Determining Whether The Clackamas Physician-Shareholders Are Employees Of A Professional Corporation Is Whether They Perform Traditional Employee Duties For The Professional Corporation.

The proper inquiry in determining whether a shareholder or director is an employee of a professional corporation is whether that shareholder or director performs traditional employee duties for that professional corporation. While the court in *Hyland* properly recognized that employees, such as the four physicians here, are employees of the corporation because of their status as "corporate employees" pursuant to employment agreements, *see Hyland*, 794 F.2d at 798, the *Trainor* decision refines the court's analysis in *Hyland* where such a result is not as obvious, *Trainor*, 2002 U.S. App. LEXIS 25654 at **27-28.

This Court has recognized that "there is nothing inherently inconsistent between the coexistence of proprietary and an employment relationship." *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 32 (1961). Honoring this recognition, the Tenth Circuit, in determining whether shareholders in a professional corporation are employees, found it useful to look to cases where the corporate officers or directors have also been deemed corporate employees. *See Trainor*, 2002 U.S. App. LEXIS 25654 at *27. The Tenth Circuit observed that the courts have embraced a three-part test which includes:

1) whether the director has undertaken traditional employee duties;
2) whether the director was regularly employed by a separate entity; and

3) whether the director reported to someone higher in the hierarchy.

Id. (citing EEOC v. Johnson Higgins, Inc., 91 F.3d 1529, 1539 (2d Cir 1996)). Because this inquiry captures the true essence of an employment relationship, it should be adopted by this Court in determining whether a shareholder of a professional corporation is an employee under the various anti-discrimination statutes. *See, e.g., Walters v. Metro. Educ. Enter., Inc.* 519 U.S. 202, 212 (recognizing that "the ultimate touchstone under § 2000e(b) is whether an employer has an employment relationship with 15 or more individuals").

Here, it is not necessary to apply the *Trainor* analysis because the four physicians have obvious employment relationships with Clackamas as evidenced by their employment agreements with Clackamas. JA 71; *Clackamas*, 271 F.3d at 906. Further, Oregon law treats the four physicians as employees of the corporation because they engage in employment services on behalf of the corporation. In particular, the Oregon law provides that a "'Licensed Oregon Shareholder' means a shareholder of a professionai corporation who holds a license to *render the specified professional services of the corporation.*" OR. REV. STAT. § 58.185(1)(a) (emphasis added). Further, Oregon law provides that "'[s]pecified professional services' means, for each professional corporation, the professional service or services to be *rendered through the professional corporation.*" OR. REV. STAT. § 58.185(1)(b) (emphasis added). Thus, Oregon law contemplates that the physicians in this case perform employee duties, e.g. the rendering of medical services, on behalf of Clackamas, and thus are employees of Clackamas.

Although it is not necessary to apply the *Trainor* three-part test in this case, the four physicians nevertheless would be deemed employees under such analysis. For example, and perhaps most telling in this case, the physicians received salaries and bonuses for performing their professional services as doctors for the corporation. JA at 35; *see Walters*, 519 U.S. at 211 (finding "in determining the existence of an employment relationship petitioners look first and primarily to whether the individual in question appears on the employer's payroll"). Further, there is no evidence that the physicians performed medical services for any other entity, other than Clackamas. Thus, because they contributed to Clackamas's production of medical services and were paid for those services, the four physicians would be deemed employees under the Tenth Circuit's approach.

The Tenth Circuit's analysis is consistent with cases addressing whether corporate officers, who have chief responsibility for running the business, are deemed employees for purposes of federal remedial statutes. *See EEOC v. First Catholic Slovak Ladies Ass'n*, 694 F.2d 1068, 1070 (6th Cir. 1982), *cert. denied*, 464 U.S. 819 (1983) (finding officers of non-profits corporation were employees protected by ADEA); *Stanojev v. Ebasco Serv.s, Inc.*, 643 F.2d 914, 916 (2d Cir. 1981) (finding vice-president of corporation covered by ADEA); *Cf. Graves v. Women's Prof. Rodeo Ass'n.*, 907 F.2d 71, 72-73 (8th Cir. 1990) (finding that members of corporation were not employees because they did not receive compensation for services and therefore did not have employment relationships with corporation); *Zimmerman v. N. Am. Signal Co.*, 704 F. 2d 347, 351-52 (7th Cir. 1983), *overruled on other grounds by Walters v. Metro. Educ. Enter. Inc.*, 519 U.S. 202 (1997) (finding corporate officers who were paid for their services and worked for corporation were deemed employees, while

officers who were unpaid and took no part in corporate daily affairs were not considered employees).

Finally, as recognized by the Government's brief, the common law agency test is not entirely applicable to the issue presented in this case. In particular, the common law test is appropriate in cases involving whether one is an employee or an independent contractor. *See Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992). The line-drawing exercise employed under the common law test is between those who are really part of a business (employees) and those who are running a separate business (independent contractor). Factors for that analysis, however, are not helpful in drawing lines between people who are part of the same enterprise. *See Hyland*, 794 F.2d at 798 (recognizing "it is one thing to apply an economic realities test to distinguish an employee from an independent contractor or partner, but it is quite another to apply the test in an attempt to identify as partner one associated with a corporate enterprise"); *Wheeler v. Hurdman*, 825 F.2d 257, 271-272 (10th Cir. 1987). Given the evidence that the four physicians are employees, there is simply no reason to undertake a complex, unwieldy, fact-intensive analysis as to whether they are "like" partners.

3. The *Trainor* Approach Is A Bright Line Test That Injects Certainty And Consistency Into The Administration Of Anti-Discrimination Statutes.

This Court has already rejected a definition of the term employee under Title VII that would "turn the coverage determination into an incredibly complex and expensive factual inquiry." *Walters*, 519 U.S. at 210; *see also Darden*, 503 U.S. at 326 (rejecting an approach for defining employee that was "infected with circularity and unable to furnish predictable results"). Both the Petitioner's "economic

realities test" and the Government's multi-factored test would do just that. While the Government recognizes that an approach like the one applied by the *Hyland* court would be easy to administer, it fails to acknowledge the potentially chaotic fact-intensive analysis associated with the administration of the Government's test as it applies to professional corporations.

One can easily imagine situations where shareholders would go in and out of coverage within a given month or year. For example, under the facts of this case, if Clackamas were to bring on one additional physician shareholder, presumably the amount of control held by the other four physician shareholders would diminish, and control would be spread among five physician shareholders, instead of the four physician shareholders. Under the Petitioner's test, a new factual analysis would be necessary to determine the "economic realities" of having just one additional physician shareholder. Next, imagine if Clackamas were to bring on an additional five shareholders. There, control would spread among ten physician shareholders, and a new factual determination would again have to be completed under the Petitioner's and the Government's approach to determine who is an employee. Presumably, at some point, some of the shareholders would have to be considered "employees" under the Government's test because they would not exert the type of control as the other more senior physician shareholders. This kind of fact intensive shareholder by shareholder analysis would "turn the coverage determination into an incredibly complex and expensive factual inquiry," *Walters*, 519 U.S. at 210, and is an approach that is "unable to furnish predictable results," *Darden*, 503 U.S. at 326. *See also Wheeler*, 825 F.2d at 271-272. Not only has this result been rejected by this Court, but it is also avoided under the *Trainor* approach.[11] Under *Trainor*, because each of these

physicians performs medical services for Clackamas, they would each be considered employees of Clackamas for purposes of the anti-discrimination laws.

Additionally, the Petitioner's argument that their approach is one that insures small businesses are not financially drained is simply wrong. Under their theory, a small business with sixteen individuals would be held liable under the economic realities test, but businesses with many more individuals would escape coverage. For example, imagine Company A, a professional corporation with fifteen employees and one sole director and shareholder. Under all the tests offered in this case, Company A would be subject to coverage under the anti-discrimination laws. Now, imagine Company B, a professional corporation with fourteen employees, and an additional ten directors and shareholders, who each perform services for the corporation, and who all own shares and control the company equally. Under the Petitioner's theory, Company A would be an employer under the ADA, while Company B would not, despite the fact that Company B is almost double its size. Under the *Trainor* approach, however, both companies would be covered under the ADA.

Moreover, to demonstrate the legal inconsistency and circularity of the Petitioner's argument, assume this is a race case triggering coverage under 42 U.S.C. § 1981, as well as Title VII. Under the Petitioner's theory, Clackamas would

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[11] As suggested by the Government, the definition of employee would be the same whether addressing coverage, or addressing whether one can sue under the relevant employment anti-discrimination law. In that situation, the chaotic situation posed by the Petitioner's and the Government's mulit-factored test is significantly magnified. Again, this kind of fact intensive analysis is not something the drafters of the anti-discrimination statutes could have envisioned in determining who can sue, when that person is indisputably part of a business, and the only question is whether one is an employer or employee.

argue there is no Title VII coverage because the four participating director/shareholders can not be treated as employees and therefore the 15 employee threshold triggering Title VII coverage is not met. Should the employee then argue that the four participating officers/shareholders are individually liable under 42 U.S.C. § 1981, it would be virtual malpractice for the shareholders not to invoke the corporate shield insulating them from suit. Thus, disavowing the corporate structure, Clackamas avoids coverage under Title VII, while the shareholder/partners simultaneously insulate themselves from personal liability by adopting the very corporate shield that was used to escape organizational liability under Title VII. This result is "infected with circularity," and is avoided under the *Trainor* approach.[12] *Darden*, 503 U.S. at 326. Because the *Trainor* approach offers certainty and consistency to both professional corporations and corporations and is legally compelling, it should be adopted by this Court.

4. Focusing On Whether The Clackamas Physician Shareholders Perform Traditional Employee Duties For Clackamas Is Consistent With The Legislative History Of Title VII, The Source Of The ADA Definition Of Employee And Employer.

This case turns on a construction of section 12111(5)(a), the provision which exempts small employers from ADA coverage. Because the definition of "employer"

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[12] Of course under § 1981, there may be a cause of action against Clackamas as a corporate entity because § 1981 does not have a minimum employee threshold for coverage. That result, however, further demonstrates the legal inconsistency of Petitioner's theory in that Clackamas is a corporate entity that would be subject to suit under § 1981, but would be able to disavow that corporate existence for Title VII purposes.

under the ADA is identical to that contained in Title VII, courts have applied cases construing the definition of "employer" in Title VII cases to ADA cases. *Compare* 42 U.S.C. § 12111(5)(A) with 42 U.S.C. § 2000e(b); *see Butler v. City of Prairie Vill.*, 172 F. 3d 736, 744 (10th Cir. 1999). Accordingly, it is appropriate to review the legislative history of Title VII for guidance in interpreting this provision of the ADA.

Section 701(b), which provides that employers are covered by Title VII only if they have fifteen employees for a specified time period, serves as a limitation on the reach of a remedial statute enacted to implement a national policy of the highest priority. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974). Thus, this exception for small businesses should be narrowly construed in order to achieve the remedial purpose. *See Robinson*, 519 U.S. at 341 (recognizing that "the plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole"); *Wheeler*, 825 F. 2d at 262 (stating "[i]n our review of the anti-discrimination statutes we must be mindful of their remedial purposes, and liberally interpret their provisions to that end); *Chavero v. Local 241, Div. of Amalgamated Transit Union*, 787 F.2d 1154, 1156 (7th Cir. 1986).

The remedial purposes of the anti-discrimination statutes are best served by a construction of the term "employer" that allows inclusion under the Act's protection of the greatest number of persons consistent with Congress's intent. When Title VII was passed in 1964, section 701(b) allowed for an exception to the compelling policy of non-discrimination by exempting small employers originally defined as employers with fewer than twenty-five employees. *See* Civil Rights Act of 1964, Pub. L. No. 352,

78 Stat. 241. Congress soon found this exception to be too broad, however, and in 1972, in order to increase coverage, reduced the statutory minimum number of employees from twenty five to fifteen. *See* 42 U.S.C. §2000e(b); *see also Armbruster v. Quinn*, 711 F.2d 1332, 1337 (6th Cir. 1983) (noting "[w]e construe the Amendment's broad reach as an indication of Congress' desire to have the entire Act broadly construed").

Two significant statements in the House and Senate Reports capture Congress's desire to broaden the reach of Title VII so that smaller employers were also held accountable for unlawful acts of discrimination. In the House Report, Congress recognized that "discrimination in employment is contrary to the national policy and is equally invidious whether practiced by small or large employers." *See* H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 20, *reprinted in Subcomm. on Labor-Senate Comm. on Labor and Public Welfare Legislative History of the Equal Employment Opportunity Act of 1972 ("1972 Legislative History")* at 80. In particular, the House Report recognized that "because of the existing limitation . . . a large segment of the Nation's work force is excluded from an effective Federal remedy to redress employment discrimination." *Id.* Likewise, the Senate Report stated that "discrimination should be attacked wherever it exists [] recognize[ing] that small establishments have frequently been the most flagrant violators of equal employment opportunity." *See* S. Rep. No. 92-415, 92d Congress, 1st Sess. 8, *reprinted in 1972 Legislative History* at 417.

Moreover, this Court interpreted has already the term "employee" in Title VII to include former employees because exclusion of those individuals "would be destructive" of "a primary purpose of the anti-retaliation provision: [m]aintaining unfettered access to statutory

remedial mechanisms." *Robinson*, 519 U.S. at 346. For similar reasons, the *Trainor* approach allows for access to the fullest extent possible to victims of discrimination. Accordingly, the remedial purposes of the various anti-discrimination statutes are best served by an interpretation of the terms "employee" and "employer" that would extend protection of the anti-discrimination statutes to the greatest number of persons consistent with Congress's intent.

CONCLUSION

For the foregoing reasons, the *amici* respectfully submit that the judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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